Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

UNITED TECHNOLOGIES CORPORATION,
by its division PRATT & WHITNEY,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In this Freedom of Information Act ("FOIA") case, the question is whether Respondent Federal Aviation Administration may deny Petitioner's request for disclosure of certain documents – design drawings for aircraft engine replacement parts – on the ground that the withheld design drawings contain "confidential commercial information" within the meaning of FOIA Exemption 4, even though the design drawings are, in fact and as a matter of law, *identical* to Petitioner's own design drawings and, thus, contain only information that is already known to Petitioner.

PARTIES TO THE PROCEEDING

The parties identified in the caption were the only parties to the proceedings in the courts below.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioner United Technologies Corporation, by its division Pratt & Whitney, certifies that it has no parent companies, non-wholly-owned subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

Petitioner United Technologies Corporation, by its division Pratt & Whitney ("Pratt & Whitney"), respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, entered on December 23, 1996.

OPINIONS BELOW

The court of appeals' opinion in this case is reported at 102 F.3d 688 (2d Cir. 1996) and is reprinted in the appendix hereto ("App.") at App. 1. Recommended rulings issued in this case by United States Magistrate Judge Thomas P. Smith of the United States District Court for the District of Connecticut on October 19, 1994, April 4, 1995, and November 2, 1995, are unreported and are reprinted at App. 13, 21, and 32, respectively. Orders issued by the United States District Court for the District of Connecticut on January 9, 1995, May 25, 1995, and February 1, 1996, approving and adopting the magistrate judge's recommended rulings are unreported and are reprinted at App. 20, 31, and 51, respectively. The corrected judgment entered by the district court on February 5, 1996, is unreported and is reprinted at App. 52.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1996. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

Relevant provisions of the Freedom of Information Act are codified at 5 U.S.C. § 552 and are reprinted at App. 53. Relevant provisions of the Federal Aviation Administration's Parts Manufacturer Approval regulations are codified at 14 C.F.R. § 21.303 and are reprinted at App. 55.

STATEMENT OF THE CASE

This case involves Petitioner Pratt & Whitney's efforts to compel the Federal Aviation Administration ("FAA") to comply with the requirements of the Freedom of Information Act ("FOIA"). In late 1991, Pratt & Whitney made two FOIA requests seeking information pertaining to the FAA's decisions to grant so-called Parts Manufacturer Approvals ("PMAs") to two companies, thus entitling the companies to sell replacement parts for aircraft engines designed and manufactured by Pratt & Whitney. Pratt & Whitney made these FOIA requests in order to determine the manner in which the FAA administered its PMA program, and to determine whether its own proprietary information relating to its engine parts – developed by Pratt & Whitney at enormous expense – was being misused by PMA applicants. The FAA released some records to Pratt & Whitney in response to its requests, but withheld certain other records – in particular, design drawings relating to the engine parts at issue – on the basis of FOIA Exemption 4, 5 U.S.C. § 552(b)(4), which allows agencies to withhold, among other things, confidential commercial information. The district court

upheld the FAA's decision to withhold the design drawings as exempt, and entered summary judgment in the FAA's favor. The court of appeals affirmed the district court's decision.

1. The documents at issue in this action were submitted to the FAA in connection with applications to market replacement parts for engines designed and manufactured by Pratt & Whitney. Pursuant to the statutory scheme established by the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 40101, *et seq.*, the FAA must approve the design of each aircraft engine (and the parts thereof) to be manufactured within its regulatory jurisdiction. If the design is approved, the applicant is awarded a "type certificate." *See* 14 C.F.R. Parts 21 & 33. An applicant is entitled to a type certificate for an engine if the "applicant submits the type design, test reports, and computations necessary to show that the product to be certificated meets the applicable airworthiness, aircraft noise, fuel venting, and exhaust emission requirements of the Federal Aviation Regulations and any special conditions prescribed by the Administrator. . . . " 14 C.F.R. § 21.21(b). FAA regulations provide that the "holder or licensee of a type certificate . . . may . . . [o]btain approval of replacement parts for that product." *Id.* § 21.45.

Pratt & Whitney is engaged in the business of, among other things, designing, manufacturing, and selling aircraft engines and replacement parts for aircraft engines. Pratt & Whitney has received from the FAA "type certificates" approving the design of its aircraft engines and thus the replacement parts therefor. J.A. 20-21.[1] In order

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[1] "J.A." refers to the joint appendix filed with the court of appeals.

to obtain these type certificates, Pratt & Whitney submitted to the FAA detailed drawings, design data, and specifications relating to its engines and engine parts, including replacement parts. These drawings, design data, and specifications are the product of Pratt & Whitney's innovation and its investment of billions of dollars. Pratt & Whitney has not made these drawings, design data, and specifications available to the public and does not disclose them to any person or entity other than the FAA, the Department of Defense and other government customers if required by contract, authorized licensees of Pratt & Whitney, and certain other parties, for limited purposes, who have agreed to maintain the confidentiality of such information. These drawings, design data, and specifications are trade secrets and/or protected proprietary information belonging to Pratt & Whitney. J.A. 20-21.

2. The FAA has by regulation provided for a scheme by which any person may receive FAA approval for the manufacture and sale of replacement parts for aircraft engines, including Pratt & Whitney engines. 14 C.F.R. § 21.303. Such an approval, known as a Parts Manufacturer Approval ("PMA"), allows the holder of the PMA to manufacture and sell specified replacement parts directly to users of such parts, such as owners of aircraft engines on which the parts are to be installed. An application for a PMA must include, *inter alia*, the "design of the part," consisting of "[d]rawings and specifications necessary to show the configuration of the part," as well as "[i]nformation on dimensions, materials, and processes" relating to the part's structural strength. *Id.* § 21.303(c)(3). In addition, a PMA application must also include information sufficient to enable the FAA to determine whether a

replacement part is airworthy. This information can be provided in one of two primary ways. First, the PMA applicant may submit "[t]est reports and computations necessary to show that the design of the part meets the airworthiness requirements of the Federal Aviation Regulations applicable to the product on which the part is to be installed. . . . " *Id.* § 21.303(c)(4). Alternatively, a PMA applicant need not submit such detailed and costly information if it can show that "the design of the part is *identical* to the design of a part that is covered under a type certificate." *Id.* (emphasis added). A PMA issued under this latter method is known as an "identicality" PMA.[2]

3. The FAA has issued a significant number of identicality PMAs authorizing applicants to manufacture and sell replacement parts for Pratt & Whitney engines. In issuing these PMAs, the FAA made a determination that the design of the part covered by the PMA was identical to the design of a part that is covered under a type certificate held by Pratt & Whitney. J.A. 22.

Pratt & Whitney has reason to believe that certain PMA applicants have obtained "identicality" PMAs for replacement parts for Pratt & Whitney engines by improperly obtaining, retaining, and using Pratt & Whitney design drawings, specifications, or other proprietary information. Furthermore, Pratt & Whitney is concerned that the FAA has facilitated such improper practices through its administration of the identicality

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[2] In addition, an applicant seeking a PMA under the identicality regime must certify that it has established a fabrication inspection system that comports with the requirements of section 21.303(h) of the Federal Aviation Regulations. 14 C.F.R. § 21.303(h).

regulation of its PMA program. These practices give the PMA applicants who engage in them an unfair competitive advantage over Pratt & Whitney, as such practices allow the PMA applicants to benefit, with little or no corresponding costs, from the designs Pratt & Whitney developed at enormous effort and expense.

4. In order to investigate the nature and extent of any such improper practices, Pratt & Whitney made two FOIA requests to different FAA regional headquarters. One request (the "Pyromet Request"), addressed to the FAA's Great Lakes Regional Headquarters, sought to obtain information relating to certain PMAs for three Pratt & Whitney parts issued to Pyromet Industries of Muncie, Indiana ("Pyromet"). J.A. 22-23, 34-35. The second request (the "Turbine Kinetics Request"), addressed to the FAA's New England Regional Headquarters, sought to obtain information relating to certain PMAs for five Pratt & Whitney parts issued to Turbine Kinetics of Glastonbury, Connecticut ("Turbine Kinetics"). Both requests sought the "entire administrative record upon which the FAA based its decision to issue" a PMA for the described parts. Pratt & Whitney specifically requested "all drawings and specifications as well as test reports or other documents which the FAA used and/or relied on in making its decision to issue a PMA certificate for the specific parts described. . . . " J.A. 24, 34-37.

The FAA released a number of documents pertaining to PMAs issued for the requested parts. Among the released documents were Pyromet letters to the FAA referencing Pratt & Whitney design drawings as enclosures. The FAA did not release, however, any Pratt & Whitney design drawings or specifications relating to the described parts, and it indicated that it had withheld

certain records, including Pyromet and Turbine Kinetics design drawings or specifications, relating to the parts. The FAA determined that the withheld records constituted confidential commercial information and were therefore exempt from disclosure under FOIA Exemption 4. J.A. 25-26, 39-42. Pratt & Whitney administratively appealed the FAA's decision, arguing that because the PMAs were issued on the basis of identicality rather than upon the submission of information sufficient to establish independently the parts' airworthiness, the Pyromet and Turbine Kinetics design drawings must, as a matter of law, be identical to Pratt & Whitney proprietary information. Thus, there was no basis for withholding these items from Pratt & Whitney as confidential commercial information under Exemption 4. J.A. 27-28, 43-82.

In denying the appeal, the FAA first noted that while there was "no gainsaying" Pratt & Whitney's argument that disclosure *to Pratt & Whitney* of the *Pratt & Whitney* design drawings used in the PMA decisions would not be protected under FOIA Exemption 4, the FAA had determined that "[n]o material that appears on its face to be [Pratt & Whitney's] has been withheld." J.A. 85. With respect to Pyromet design drawings and specifications, the FAA stated that it was "not able to resolve competing claims of property rights. We accept at face value any submitter's claim that it has a protectable proprietary interest in data it submits to the FAA so long as the data appears on its face to be proprietary to the submitter and nothing in our records indicates that the information is not normally held confidential to the submitter." J.A. 86. Pratt & Whitney's appeal of the FAA's response to its Turbine Kinetics Request was denied in relevant part for the same reasons as the Pyromet appeal.

5. Pratt & Whitney filed its complaint in this action on June 18, 1993. Shortly thereafter, the FAA began locating additional records that had not been found when the agency conducted its initial searches for responsive documents. For example, the FAA located and released proprietary Pratt & Whitney specifications submitted to the FAA by Pyromet in support of its PMA applications. J.A. 97, 196. Similarly, in December 1994, a year and a half after this suit was filed, the FAA notified Pratt & Whitney that it had found, and was withholding, twelve additional design drawings that were responsive to the Pyromet Request. J.A. 255.

The case was referred by the district court to Magistrate Judge Smith. Both the FAA and Pratt & Whitney moved for summary judgment on the merits of the FAA's decision to withhold records on the basis of FOIA Exemption 4.[3] For purposes of his recommended ruling, the magistrate judge assumed that the withheld design drawings were identical in *fact*, as well as in law, to the corresponding Pratt & Whitney design drawings. App. 42. The magistrate judge nonetheless held that Pratt & Whitney did not enjoy any right of "special access" under FOIA to the records. In this regard, the magistrate judge ruled inapplicable this Court's decision in *Department of Justice v. Julian*, 486 U.S. 1 (1986), which held that while the identity of a FOIA requester ordinarily has no bearing on the releaseability of the records he has requested, in certain situations a particular requester may be entitled to release of the records even though the records would be

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[3] The parties also litigated over the adequacy of the FAA's search for responsive records. That issue was not raised before the Second Circuit and is not presented here.

exempt if requested by anyone else. According to the magistrate judge, *Julian*'s holding was "limited" by this Court's later decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). App. 42. The magistrate judge further held that the FAA had sustained its burden of demonstrating that the records withheld by the FAA constituted confidential commercial information protected from disclosure under FOIA Exemption 4. App. 43. The district court entered an order, without opinion, affirming, approving, and adopting the magistrate judge's recommended ruling. App. 51.

6. The Court of Appeals for the Second Circuit affirmed the district court's decision. Noting that the FAA had "conceded at oral argument that it is willing to assume that the [withheld] design drawings are identical in all respects to the drawings contained in the type certificates held by Pratt & Whitney," App. 7,[4] the court

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[4] Notwithstanding its assumption that the withheld drawings were in fact identical to the corresponding Pratt & Whitney drawings, the court of appeals noted, gratuitously and erroneously, that "identicality" for PMA purposes "does not require that the specifications for a replacement part be exactly the same as those for the original part," but rather only that the FAA has determined "'that the PMA part will be an adequate replacement for the original part as to fit, form, and function.'" App. 4. In accepting the FAA's arguments regarding the meaning of "identicality," the court of appeals did not rely upon any FAA regulations, policy statements, or interpretive guidelines, or even upon any FAA manuals, position statements, or chief counsel opinions. Instead, the court of appeals based the "adequate replacement" standard for identicality on a summary judgment affidavit prepared by an FAA engineer who worked in one of the FAA's regional offices. The FAA's self-serving definition of "identical," which was announced for the first time in a document prepared solely for

nonetheless dismissed as "irrelevant" the fact that "Pratt & Whitney already has knowledge of the information contained in the withheld documents." Since it "is a basic principle under FOIA that the individuating circumstances of a requester are not to be considered in deciding whether a particular document should be disclosed," the withheld drawings were exempt from disclosure under Exemption 4 even though the documents were not "confidential" as to Pratt & Whitney. App. 8. The court noted that in *Julian* this Court had crafted only a "narrow exception" that distinguished between requesters who are the "subjects" of the requested records, and other "third party" requesters. Under *Julian*, according to the court of appeals, only the former group of requesters has a right of "special access" to requested records.

The court of appeals based its reading of *Julian* on this Court's later decision in *Reporters Committee*. App. 9. *Reporters Committee*, according to the court of appeals, explained that *Julian* applies "only where the Government's 'objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege.' " App. 10 (quoting *Reporters Committee*, 489 U.S. at 771). Because the court of

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purposes of litigation, and which is at war with both the dictionary and common sense definitions of the term, should not have been accorded deference by the court of appeals. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). This is especially so in light of the fact that the FAA not only failed to prove or even to claim that the withheld design drawings at issue in this case were not in fact identical to the corresponding Pratt & Whitney drawings, but also opposed, successfully, Pratt & Whitney's request that the district court conduct an *in camera* comparison of the drawings to confirm that they are in fact identical.

appeals did not consider Pratt & Whitney to be the "subject" of the withheld Pyromet and Turbine Kinetics design drawings, nor to be "the party for whom the protections of Exemption 4 were intended," the court of appeals held that Pratt & Whitney had no claim of "special access" under *Julian*. Accordingly, the Second Circuit held that the records were protected under Exemption 4 from disclosure to Pratt & Whitney. App. 10-12.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision presents an important legal question regarding the proper implementation of the FOIA's core principle of broad access to government information. That question is whether a federal agency may withhold documents from a particular FOIA requester on the ground that the documents contain "confidential commercial information" within the meaning of FOIA Exemption 4, even though the documents are, as a matter of fact and of law, *identical* to the requester's own documents and, thus, cannot contain information that is confidential as to the requester. The court of appeals held that such a requester does not enjoy any right of "special access" under FOIA and that if the requested records are protected under Exemption 4 from disclosure to any other member of the public, they are also exempt when requested by a person who *already knows* the information contained in the requested records.

The court of appeals' decision is in direct conflict with this Court's decision in *Julian*, in which the Court recognized the common-sense proposition that there is "good reason to differentiate" between an agency assertion of an exemption to withhold records from someone

who already knows the information contained in the requested records, and an agency assertion of an exemption to withhold such records from those who do not. *Julian*, 486 U.S. at 14. Nor was the Court's decision in *Julian* subsequently limited (as the courts below would have it) in *Reporters Committee*. *Reporters Committee* holds only that the motives or purposes of a particular FOIA requester have no bearing upon the merits of his or her FOIA request. 489 U.S. at 771. The principle announced in *Reporters Committee* is not at issue in this case, which is on all fours with *Julian*.

The court of appeals' resolution of the "special access" issue also conflicts with other court of appeals and district court decisions. In particular, the decision below conflicts with the Third Circuit's decision in *Grasso v. IRS*, 785 F.2d 70 (3d Cir. 1986), a pre-*Julian* case that accurately anticipated this Court's reasoning in *Julian*, and with *Fine v. Department of Energy*, 823 F. Supp. 888 (D.N.M. 1993), which correctly applied this Court's decisions in *Julian* and *Reporters Committee*.

Quite apart from the fact that the decision below cannot be reconciled with *Julian* and other federal court decisions, this case warrants review because it does violence to the core principles underlying the FOIA. Congress intended FOIA to establish a scheme of "broad" disclosure of government records and to allow records to be withheld only if the withholding agency demonstrates that the records fall precisely within one or more of the statute's nine enumerated exemptions, which "are to be narrowly construed." *Julian*, 486 U.S. at 8. *See also United States v. Weber Aircraft Corp.*, 465 U.S. 792, 793-94 (1984); *FBI v. Abramson*, 456 U.S. 615, 630 (1982); *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The decision

below, however, authorizes the blanket withholding of records when no purpose whatsoever is served by secrecy. This Court should hear this case, therefore, not only to clarify and reaffirm its decision in *Julian*, but also to clarify and reaffirm the basic policy underlying FOIA – that an effective democratic government depends on the existence of an informed citizenry "to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Exemption 4 Does Not Require That Otherwise Confidential Commercial Information Be Withheld From A Requester Who Already Possesses The Requested Information

FOIA Exemption 4 allows agencies to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The FAA did not rely upon the "trade secrets" prong of Exemption 4 to justify its withholding of the records at issue in this case, but relied instead solely upon the "confidential commercial information" prong of the exemption. The FAA, therefore, had the burden of demonstrating that the information requested by Pratt & Whitney was "confidential" within the meaning of Exemption 4.

Both the district court and the court of appeals assumed that the design drawings at issue were *identical* in fact, as well as in law, to the corresponding Pratt & Whitney design drawings. App. 42, 7. This fact, standing alone, should have been fatal to the FAA's reliance on Exemption 4. An essential and indispensable element of an Exemption 4 claim is that the withheld information be

"secret" or "confidential" – that is, that it be *unknown* to the requester. Thus, the court of appeals decision denying Pratt & Whitney's FOIA request is squarely at odds with the very text of Exemption 4.

To be sure, the fact that commercial information *is* confidential – *i.e.*, not known to the requester – does not necessarily qualify it as "confidential commercial information" within the meaning of Exemption 4. To qualify as "confidential business information," the requested information not only must be confidential, it must also be likely to cause substantial competitive harm to the submitter if disclosed pursuant to the request.[5] No case suggests, however, that "confidential commercial information" need not be *confidential*.

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[5] In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), the D.C. Circuit adopted a two-part test for determining whether withheld information is confidential:

> [C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. (footnote omitted).

The Second Circuit has explicitly adopted this two-part test for confidentiality. *See Continental Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977). *See also American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978). With respect to the withheld design drawings here, the FAA relied in its summary judgment papers only upon the second part of the *National Parks* confidentiality test. Thus, the FAA argued that disclosure of such records would be likely to cause competitive harm to Pyromet and Turbine Kinetics.

We acknowledge, as we did below, that if the relevant legal test controlling the outcome of this case is whether disclosure of the requested design drawings *to the general public* would cause competitive harm to the submitter of the records, the courts below were correct in determining that the records are exempt under FOIA Exemption 4. Indeed, *public* disclosure of the requested design drawings, which are identical to (and may be derived from) Pratt & Whitney's own confidential proprietary design drawings, would no doubt cause Pratt & Whitney itself graver competitive harm than either Pyromet or Turbine Kinetics. Common sense dictates however, that if the applicable test is whether disclosure of these identical records *to Pratt & Whitney* would cause competitive harm to Pyromet or Turbine Kinetics, the documents are obviously not exempt. The threshold legal issue in this case, therefore, is whether Pratt & Whitney may be entitled to disclosure of the records even if the drawings would be protected under Exemption 4 from disclosure to any other requester. The court of appeals' resolution of this legal issue conflicts both with a controlling decision of this Court, with other relevant federal court decisions, and with common sense.

A. The Court Of Appeals' Decision Conflicts With This Court's Decision In *Julian*

Again, an essential and indispensable element of an Exemption 4 claim is that the withheld information be *confidential – unknown* to the requester. Just as obviously, disclosure to Pratt & Whitney of information that is *identical* to the design information previously developed by Pratt & Whitney cannot cause harm to the legitimate competitive interests of the submitter of that information,

and cannot otherwise breach the confidentiality of the disclosed information, for nothing will be disclosed to Pratt & Whitney that Pratt & Whitney does not already know. The same cannot be said, however, in the case of a request for the same information from any other party.

This Court adopted precisely this reasoning in a FOIA case arising under Exemption 5, which exempts inter-agency or intra-agency memoranda that would not be available by law to a private party in litigation with the agency. 5 U.S.C. § 552(b)(5). In *Department of Justice v. Julian*, 486 U.S. 1 (1988), the Court considered whether a prison inmate was entitled to FOIA disclosure of his own presentence investigation report. The government argued, among other things, that the report was properly withheld under Exemption 5. The Court noted that presentence reports have generally been held to be privileged from discovery in cases brought by third parties. But the rationales for the privileged nature of a presentence report – to avoid "a chilling effect on the willingness of various individuals to contribute information" for the report and "to protect the confidentiality of the information contained in the report" – would have "little applicability to a request by a defendant to examine his own report, particularly in light of [Federal Rule of Criminal Procedure 32(c)'s] specific mandate that the report be *disclosed to the defendant* during sentencing." 486 U.S. at 12-13 (emphasis added). Indeed, the Court concluded that Congress had effectively waived any privilege the government might have as against the subject of a presentence report: "[T]he thrust of the disclosure portions of Rule 32(c) and the Parole Act speaks so strongly against the existence of a privilege on the part of the Government when the request is from the subject of the

report that we think it accurate to say that Congress has strongly intimated, if it has not actually provided, that no such privilege should exist." *Id.* at 13.

In so holding, the Court rejected the argument advanced by the government (and adopted by the dissenting Justices[6]) that the individuating characteristics of a FOIA requester or class of requesters are always irrelevant:

> The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean that in no situation whatever will there be valid reasons for treating a claim of privilege under Exemption 5 differently as to one class of those who make requests than as to another class. In this case, it seems clear that there is good reason to differentiate between a governmental claim of privilege for presentence reports when a third party is making the request and such a claim when the request is made by the subject of the report.

Id. at 14.

While *Julian* involved a withholding of records under FOIA Exemptions 3 and 5, there is nothing in the opinion suggesting that its holding was limited to cases involving those exemptions.[7] Indeed, as we discuss below, *infra* at

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[6] The dissent in *Julian* adopted the precise argument that the FAA advanced, and that the courts below accepted, in this case. Justice Scalia (joined by Justices White and O'Connor) argued that the majority's decision conflicted with "the general principle of the [FOIA] that individuating characteristics of requesters are not to be considered." 486 U.S. at 15.

[7] There is nothing about either Exemption 3 or Exemption 5 that would limit the *Julian* reasoning to cases involving those

24-25, in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989) – a case heavily relied upon by the FAA and by the courts below – the Court confirmed the applicability of the *Julian* rationale to a case involving Exemption 7(C). Here, the logic and reasoning of *Julian* are just as compelling, if not more so, in the Exemption 4 context. As in *Julian*, "there is good reason to differentiate" under Exemption 4 between a third party's request for allegedly confidential information and a request made by a person who, by definition, already knows the information contained in the requested records because the records are identical to, and perhaps even photocopies of, his own.[8] The point is that the

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exemptions only. Significantly, in this case the FAA did not argue and the courts below did not indicate that the distinction among classes of requesters that the Court recognized in *Julian* could never be recognized in cases involving other FOIA exemptions. Indeed, the logic of the Supreme Court's common sense approach to the issue raised in *Julian* has been applied in other contexts, including cases involving other exemptions. *See, e.g., Fine v. DOE*, 823 F. Supp. 888, 909 (D.N.M. 1993) (Exemption 7(C)); *Grasso v. IRS*, 785 F.2d 70, 76-77 (3d Cir. 1986) (Exemption 7(A)). *See infra* at 27-29.

[8] In fact, a similar point was raised in the briefs before this Court in *Julian*. The requesters argued that "even a cursory review of the statute reveals that an agency's ability to invoke the Act's exemptions often turns on whether the requester is a third party or the subject of the records in issue." Brief for Respondents at 39, *Department of Justice v. Julian*. The requesters cited to two other FOIA exemptions. First, they argued that while Exemption 6, which protects information whose disclosure would entail a clearly unwarranted invasion of personal privacy, 5 U.S.C. § 552(b)(6), would inhibit the disclosure of personal records to third parties, it would be no invasion of privacy if the request was made by the subjects of

requested information *is* confidential as to the former requester; it plainly is not as to the latter.

Significantly, the FAA, by its actions in this case, confirmed the logic of *Julian* and its applicabiity to the Exemption 4 context. After Pratt & Whitney filed its complaint in this action, the FAA released to Pratt & Whitney four proprietary Pratt & Whitney specifications which it said it had "overlooked" in responding to the original FOIA requests. J.A. 196. Obviously, these confidential documents could not and would not have been released to any other FOIA requester. Yet, although it was arguing to the courts below that Pratt & Whitney had no right of "special access" to the materials it had requested, the FAA never contended that because the Pratt & Whitney specifications must be withheld when requested by any other person, they must also be withheld from Pratt & Whitney. Such a position would have been absurd, given that Pratt & Whitney obviously *already*

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the records themselves. *Id.* The second example involved Exemption 4:

> It would be ludicrous to suggest, and the government has never done so, that an agency which releases documents containing trade secrets or confidential commercial information to a corporation which provided the agency with most of that information in the first place, is thereby precluded from claiming Exemption 4 when the corporation's competitors request the same documents.

Id. at 39-40. It is significant that the government did not dispute this characterization of Exemption 4. In this case, however, the FAA did make, and the courts below did adopt, a variant of the "ludicrous" suggestion discussed above.

knew the technical and proprietary information contained in its own specifications.[9]

The court of appeals, however, ruled that *Julian* was of no aid to Pratt & Whitney in this case. Although it recognized that *Julian* was a "depart[ure]" from this Court's "previously strict rule that the identity of the requester is irrelevant to a FOIA request," App. 9 (citing *Julian*, 486 U.S. at 15, 17-20 (Scalia, J., dissenting)), the court held:

> At most, the Court in *Julian* differentiated between a requester who is the "subject" of the documents and all other "third-party" requesters. Since only the former group of individuals would have any claim of special access under *Julian*, Pratt & Whitney, which falls into the latter group, cannot benefit from that decision.

App. 9.

The court of appeals' attempt to characterize *Julian* as focusing on a distinction between requesters who are the "subjects" of the requested records and other "third-party" requesters does not accurately explain the rationale and decision in *Julian*. The mere fact that the requesters in *Julian* were the "subjects" of the requested presentence reports cannot, standing alone, explain the result in that case. While persons may have rights under other statutory schemes (such as, for example, the Privacy Act of 1974, as amended, 5 U.S.C. § 552a) to obtain copies of federal records "about" themselves, nothing in

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[9] This release of Pratt & Whitney specifications to Pratt & Whitney was not an isolated incident. As was made clear to the courts below, the FAA has released Pratt & Whitney proprietary information to Pratt & Whitney in response to FOIA requests relating to other PMA decisions.

the FOIA provides FOIA requesters with a special right of access to such records. If a record falls within an applicable FOIA exemption, it need not be disclosed, and the mere fact that the requester is the "subject" of the record does not in and of itself entitle him to disclosure of that record.

This fact is underscored by the *Julian* decision itself. Significantly, *Julian* held that the requesters were *not* entitled to disclosure of those portions of their presentence reports containing diagnostic opinions, sources of information obtained upon a promise of confidentiality, and any other information that might cause harm to criminal defendants or to third parties. *Julian*, 486 U.S. at 4, 11. Because these portions of the reports were not subject to the limited right of access granted by Federal Rule of Criminal Procedure 32(c) and the Parole Act, they were also privileged from disclosure to the requesters under FOIA Exemption 5. This was so even though the requesters were the "subjects" of the withheld portions of the presentence reports no less than they were the "subjects" of the disclosed portions of the reports.

The fact that the FOIA requesters in *Julian* were the "subjects" of the presentence reports was relevant only because Rule 32(c) and the Parole Act entitled "subjects" to have limited access to those reports. It was this entitlement to access – effectively, the entitlement to *know* what was in the reports (other than those portions of the reports that Rule 32(c) and the Parole Act shielded from their view) – that defeated the governmental claim of privilege against disclosure of the reports to the requesters. In short, the prior access to the reports granted to the inmates was wholly incompatible with the notion that the reports were privileged against disclosure to the

inmates. By the same token, the fact that the requesters were *not* entitled under Rule 32(c) and the Parole Act to see certain portions of their presentence reports precluded those portions of the reports from later being released to the requesters under FOIA, notwithstanding the fact that the requesters were the "subjects" of those portions of the reports as well. Again, it was the requesters' entitlement to know what was in the reports, and not the requesters' status as "subjects" versus "non-subjects" of the reports (or "first party" versus "third party" requesters) that was dispositive.

The court of appeals' assignment of dispositive significance to the distinction between FOIA requests made by "subjects" of the records and requests for such documents from other people therefore simply does not withstand a careful reading of the statute or the case law. In any event, the fact that the requesters in *Julian* were the "subjects" of the requested records does not meaningfully distinguish that case from this one. It is important to note that the requesters in *Julian* did not author the records requested in that case, and did not have any ownership rights in them. The requesters in those cases were the "subjects" of the records requested only because those records were in some way *about* the requesters. Pratt & Whitney is in effectively the same position here. Pyromet and Turbine Kinetics submitted the design drawings at issue to the FAA for the very purpose of demonstrating that their designs were *identical* to Pratt & Whitney designs, and the FAA compared those design drawings to the corresponding Pratt & Whitney design drawings and found that the designs were in fact identical. Thus, the records in this case are "about" Pratt & Whitney in much the same way that the records in *Julian* were "about" the

requesters in those cases. In sum, *Julian* simply cannot be meaningfully distinguished from this case, and the court of appeals' attempt to do so really amounts to an attempt to elevate the *dissent* in *Julian* to the status of controlling authority.

B. *Reporters Committee* Does Not Limit The Applicability Of *Julian* To This Case.

The court of appeals based its reading of *Julian* on this Court's subsequent decision in *Reporters Committee*. According to the court of appeals, the Court in *Reporters Committee* "reiterated the basic principle that all third-party requesters are to be considered equally under FOIA," App. 9, and made clear that the right of "special access" recognized in *Julian* applied only "where the Government's 'objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege.' " App. 10 (quoting *Reporters Committee*, 489 U.S. at 771). Here, because Pratt & Whitney is not the "party for whom the protections of Exemption 4 were intended," App. 10, it is not entitled to disclosure of the withheld information under *Julian*. The court of appeals however, reads too much into the *Reporters Committee* opinion's fleeting reference of *Julian*.

In *Reporters Committee*, this Court held that the Justice Department could withhold the contents of an FBI "rap sheet" from a reporter under Exemption 7(C) of FOIA, 5 U.S.C. § 552(b)(7)(C), which protects from disclosure law enforcement information when disclosure could reasonably be expected to constitute an unwarranted invasion of privacy. The Court emphasized that in deciding whether an invasion of privacy would be "warranted,"

the relevant factor is whether disclosure of the information will shed light on an agency's performance of its statutory duties, and not the particular requester's motives or purposes in making the request. The relevant passage from *Reporters Committee* is as follows:

> Our previous decisions establish that whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request. Thus, although the subject of a presentence report can waive a privilege that might defeat a third party's access to that report, [citing *Julian*], and although the FBI's policy of granting the subject of a rap sheet access to his own criminal history is consistent with its policy of denying access to all other members of the general public, . . . the rights of the two press respondents in this case are no different from those that might be asserted by any other third party, such as a neighbor or prospective employer.

489 U.S. at 771 (emphasis in original).[10]

The Court in *Reporters Committee* thus expressly *confirmed* and extended to Exemption 7(C) the *Julian* Court's ruling that the applicability of an exemption under the FOIA may depend upon the individuating characteristics

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[10] *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *EPA v. Mink*, 410 U.S. 73, 86 (1973); James T. O'Reilly, *Federal Information Disclosure* § 4.06 (2d ed. 1993) ("Citizenship, *motive*, location, or status are irrelevant to the basic right of access. . . . ") (emphasis added).

of the requesters. As the *Reporters Committee* Court noted, "the FBI's policy of granting the subject of a rap sheet access to his own criminal history is consistent with its policy of denying access to all other members of the general public." 489 U.S. at 771.

It is true that *Reporters Committee* appears to characterize *Julian* as a case "in which the objection to disclosure [was] based on a claim of privilege and the person requesting disclosure is the party protected by the privilege." *Reporters Committee*, 489 U.S. at 771. This characterization of *Julian* is simply inaccurate, however, because the inmate-requester in that case was *not* the party protected by the privilege at issue. Exemption 5, as the *Julian* Court expressly noted, has long been interpreted "as 'incorporat[ing] the privileges which *the Government* enjoys under the relevant statutory and case law in the pretrial discovery context.' " *Julian*, 486 U.S. at 11 (emphasis added) (citations omitted). Thus, the issue in *Julian* was whether *the government* would be privileged from disclosing the presentence report in a lawsuit brought by the subject of the report.[11] The *Julian* Court held, as previously discussed, that the presentence report

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[11] That the "privilege" at issue in *Julian* did not belong to the FOIA requester in that case is further demonstrated by the fact, discussed by the Court, that criminal defendants themselves were not originally entitled to see their presentence reports. It was only through a series of amendments to the Federal Rules of Criminal Procedure that defendants were given a right of partial access to the reports. *Julian*, 486 U.S. at 9-10. It is a curious conception of "privilege" which holds that criminal defendants are the parties sought to be protected by the "privilege" against disclosure of presentence reports when such reports were for a long time withheld from the defendants themselves.

was not protected from disclosure to the subject of the report simply because his prior access to and review of the report had destroyed any confidentiality, and thus any government privilege, that would otherwise have attached to it. Accordingly, in *Julian*, there was "good reason to differentiate" between requesters. *Id.*

When read in context, therefore, neither the *Reporters Committee* decision in general nor its specific discussion of *Julian* affect Pratt & Whitney's right, under the *Julian* analysis, to release of the requested design drawings at issue in this case. Pratt & Whitney is not relying on any special purposes, needs, or motives it might have in seeking the PMA information at issue in this case, but is instead relying on the proposition that it already knows what is contained in design drawings that are, in fact and as a matter of law, *identical* to Pratt & Whitney design drawings. In this respect, this case is on all fours with *Julian*.[12]

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[12] This case and *Julian* are also distinguishable from *Department of Defense v. FLRA*, 510 U.S. 487, 496 (1994), in which the Court, without discussing *Julian* by name, described *Reporters Committee* as holding that "except in certain cases involving claims of privilege, 'the identity of the requesting party has no bearing on the merits of his or her FOIA request.' " (citation and footnote omitted). As in *Reporters Committee*, this discussion in *FLRA* was in the context of holding that " 'whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made.' " *Id.* (emphasis in original) (citation omitted). *Accord Bibles v. Oregon Natural Desert Ass'n*, 117 S. Ct. 795 (1997); *Massey v. FBI*, 3 F.3d 620 (2d Cir. 1993).

C. The Court of Appeals' Decision Conflicts With The Decisions Of Other Courts

In addition to conflicting irreconcilably with this Court's decision in *Julian*, the court of appeals' resolution of the "special access" issue also conflicts with decisions in FOIA cases from other circuits. In *Grasso v. IRS*, 785 F.2d 70 (3d Cir. 1986), the Third Circuit reviewed a decision by the Internal Revenue Service ("IRS") to withhold, pursuant to Exemption 7(A), portions of an IRS memorandum concerning an interview of the requester conducted by IRS agents. Noting that "[t]he situation posed when the requester seeks disclosure of his or her own statement is far different from that presented when s/he seeks statements of third party witnesses," *id.* at 76, the court rejected the IRS's contention that disclosure of the memorandum to this requester would interfere with law enforcement proceedings:

> [T]o prevail under Exemption 7(A), the government must show, by more than conclusory statements, how the particular kinds of investigative records requested would interfere with a pending enforcement proceeding. Referring to a somewhat analogous situation, . . . when the documents requested are those of a company that itself submitted the information, it is unlikely that their disclosure could reveal to the company the direction of the agency's investigation or alert the company to anything it does not know already. The typical Exemption 7(A) situation arises when the documents sought are those generated within the agency or otherwise not in the possession of or known to potential defendants. The concerns to which Exemption 7(A) is addressed are patently inapplicable here.

Id. at 77 (citations and internal quotations omitted). Although issued two years before *Julian*, the Third Circuit's decision in *Grasso* fully comports with this Court's subsequent analysis in that case, and conflicts with the decision of the court of appeals in this case.

The district court's decision is also directly at odds with the only other federal court decision to have considered the relationship of *Julian* and *Reporters Committee* in analogous circumstances. In *Fine v. Department of Energy*, 823 F. Supp. 888, 909 (D.N.M. 1993), the district court considered a FOIA request by a former Department of Energy employee for, among other things, a memorandum summarizing statements made by the plaintiff-requester himself in an interview conducted by the agency's Office of Inspector General ("OIG"). The agency had released the document, but had redacted the name of an OIG special agent, as well as the names of certain individuals who had been identified in the interview by the plaintiff-requester. The district court held that the names of the individuals identified by the plaintiff-requester had been improperly redacted, but the name of the OIG special agent could be withheld by the agency under Exemption 7(C), which protects from disclosure law enforcement investigatory records whose disclosure would "constitute a unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Citing *Reporters Committee*, the court noted that "[o]rdinarily the identity of the requesting party has no bearing on the merits of a FOIA request." *Id.* at 909. The court nonetheless concluded, relying on *Julian*, that it was proper under the circumstances "to differentiate between plaintiff, the subject of [the requested] document . . . , and other persons." *Id.* Accordingly, the district court ordered

disclosure of the names of the individuals identified by the plaintiff-requester himself, reasoning that "[p]laintiff will not learn the identity of any witness, source or third party not provided by himself, so confidentiality of information is not a legitimate concern." *Id.* In contrast, the court upheld the agency's redaction of the name of the OIG special agent, the only information in the document not already known by the plaintiff-requester.

As in *Grasso*, it was the fact that the requester in *Fine* obviously already knew the information he had given in the interview, and not the mere fact that the requester was the "subject" of the memorandum, that entitled the requester to the disclosure of the memorandum. If that were not the case, the court would not have held in *Fine* that otherwise exempt information in the memorandum that had not been provided by the requester, such as the name of the special agent who had conducted the interview, could be redacted from the memorandum. *Fine*, 823 F. Supp. at 909.

Although both *Grasso* and *Fine* were brought to the attention of the court below, its opinion made no reference to these decisions, let alone attempt to distinguish them. This Court's review is warranted in this case to resolve this conflict among the circuits.[13]

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[13] Recent decisions by the Ninth Circuit and the District of Columbia Circuit contain language on the "special access" issue that appears to comport with the court of appeals' resolution of that issue in this case. *See, e.g., Maricopa Audubon Soc'y v. United States Forest Serv.*, ___ F.3d ___, 1997 WL 100941 (9th Cir. Mar. 7, 1996); *Swan v. SEC*, 96 F.3d (D.C. Cir. 1996); *Schiffer v. FBI*, 78 F.3d 1405, 1410-11 (9th Cir. 1996). We submit that the language of these decisions, while far more sweeping than their actual holdings, is likewise fundamentally at odds with *Julian* and

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this petition for a writ of *certiorari* to the United States Court of Appeals for the Second Circuit be granted and that the case be set for plenary review.

Respectfully submitted,

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March 24, 1997

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provides additional justification for this Court's review of the important question raised in this case.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 278 – August Term 1996

Argued: October 18, 1996

Decided: December 23, 1996

Docket No. 96-6076

UNITED TECHNOLOGIES CORPORATION, by its division PRATT & WHITNEY,

Plaintiff-Appellant,

v.

FEDERAL AVIATION ADMINISTRATION,

Defendant-Appellee.

Before: NEWMAN, *Chief Judge*, LEVAL, *Circuit Judge*, and OBERDORFER, *District Judge*.*

Appeal from the February 5, 1996, judgment of the United States District Court for the District of Connecticut (T.F. Gilroy Daly, Judge), applying "confidential information" exemption to Freedom of Information Act and granting summary judgment in favor of government agency.

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* The Honorable Louis F. Oberdorfer, of the United States District Court for the District of Columbia, sitting by designation.

Affirmed.

Charles J. Cooper, Washington, D.C. (J.E. Murdock III, Vincent J. Colatriano, Shaw, Pittman, Potts & Trowbridge, Washington, D.C., on the brief), for plaintiff-appellant.

William A. Collier, Asst. U.S. Atty., Hartford, Conn. (Christopher F. Droney, U.S. Atty., New Haven, Conn., John M. Walsh, Fed. Aviation Admin., Washington, D.C., on the brief), for defendant-appellee.

LOUIS F. OBERDORDER, District Judge:

This appeal presents the unusual question of whether the "confidential information" exemption to the Freedom of Information Act ("FOIA") applies where the FOIA requester already has access through other sources to the allegedly confidential information. Appellant United Technologies Corp., by its division Pratt & Whitney ("Pratt & Whitney" or "P & W") appeals from the February 5, 1996, judgment of the United States District Court for the District of Connecticut (T.F. Gilroy Daly, Judge). The District Court held that the exemption applied, and granted summary judgment in favor of appellee Federal Aviation Administration ("FAA"). Pratt & Whitney contends that the District Court erred in refusing to consider the individuating circumstance in this case that Pratt & Whitney already has knowledge of the confidential information contained in the withheld documents.

We believe that the individuating circumstances of a third-party FOIA requester are irrelevant here, and therefore affirm the judgment of the District Court.

Background

I.

Pratt & Whitney is a corporation engaged in the business of designing, manufacturing, and selling aircraft engines and replacement parts. Pursuant to the Federal Aviation Act of 1958, before an aircraft engine may be used in civil aviation, its design must be approved by the FAA. The manufacturer must submit detailed drawings, designs, and specifications relating to the aircraft engine and its component parts. These specifications are not made available to the general public and are considered the proprietary information of the manufacturer. Upon approval of the engine, the FAA issues a "type certificate" to the manufacturer. *See* 49 U.S.C. § 44704 (1994).

The FAA has also instituted a regulatory scheme governing the manufacture and sale of replacement parts. Any person, in addition to the manufacturer, may apply to the FAA for a Parts Manufacturer Approval ("PMA"), which allows the holder to manufacture and sell specific replacement parts directly to the owners of aircraft engines. One method of obtaining a PMA is to demonstrate that "the design of the [replacement] part is identical to the design of a[n original] part . . . covered under a type certificate." *See* 14 C.F.R. § 21.303(c)(4) (1996). A PMA issued through this method is known as an "identicality" PMA. Identicality, however, does not require that the specifications for a replacement part be exactly the same as those for the original part. Rather, identicality requires only:

> that the FAA has determined from a comparison of the two sets of data and drawings, and any

other data it finds relevant, that the PMA part will be an adequate replacement for the original part as to fit, form, and function.

II.

This lawsuit arose in late 1991 when Pratt & Whitney came to believe that the FAA was issuing a large number of identicality PMAs for replacement parts in P & W engines. Pratt & Whitney claims that it had further reason to believe that certain PMA applicants were improperly obtaining PMAs by using P & W proprietary information. Subsequently, Pratt & Whitney submitted a FOIA request to the FAA, seeking the administrative record regarding the issuance of PMAs to two companies, Pyromet Industries ("Pyromet") and Turbine Kinetics ("TK").

Both Pyromet and TK had sought and received identicality PMAs for replacement parts in P & W engines. The FAA, in response to Pratt & Whitney's FOIA request, disclosed approximately 200 pages of documents in their entirety. Another eleven pages of documents were withheld in part, and approximately forty-seven pages of documents were withheld completely. Of those documents withheld, the most important are the ones containing the Pyromet and TK design drawings. The FAA invoked FOIA Exemption 4, which exempts from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." *See* 5 U.S.C. § 552(b)(4) (1994).

Pratt & Whitney objected to the FAA's withholding of those documents and sought administrative recourse. On

administrative appeal, the FAA reiterated its earlier decision that the documents submitted by Pyromet and TK contained confidential information. With respect to the Pyromet design drawings, although Pratt & Whitney argued that any information submitted by a PMA applicant under the identicality provision must be, by definition, non-confidential to the holder of the type certificate, the FAA responded:

> We are not able to resolve competing claims of property rights. We accept at face value any submitter's claim that it has a protectable proprietary interest in data it submits to the FAA so long as the data appears on its face to be proprietary to the submitter and nothing in our records indicates that the information is not normally held confidential to the submitter. . . . That is the case with the Pyromet drawings. You offer nothing by way of argument as to why documents that are *prima facie* proprietary to other companies should be released to a FOIA requester.

The FAA provided a similar rationale for its withholding of the TK design drawings.

In June 1993, Pratt & Whitney filed suit in the District of Connecticut to compel the FAA to disclose the withheld documents. After the District Court referred the case to a magistrate judge, both parties moved for summary judgment. In November 1995, the magistrate judge issued a Recommended Ruling in favor of the FAA. He first concluded that Pratt & Whitney did not have any special right of access. In doing so, he rejected Pratt & Whitney's argument that its request should be treated differently from those of all other FOIA requesters because it already

had knowledge of the confidential information. Secondly, the magistrate judge determined that the withheld documents were "confidential" within the meaning of Exemption 4, since their disclosure would cause substantial harm to the competitive positions of Pyromet and TK.

On February 5, 1996, the District Court adopted the Recommended Ruling of the magistrate judge and entered judgment in favor of the FAA. Pratt & Whitney now appeals.

Discussion

Pratt & Whitney contends that, since the documents in this case were submitted to the FAA under the identicality provision, Pratt & Whitney already has, by the very nature of that provision, access to any supposedly confidential information contained in the withheld documents. At oral argument, however, there was some discussion as to whether the Pyromet and TK design drawings were in fact identical to the P & W design drawings. For example, under the identicality provision, 14 C.F.R. § 21.303(c)(4), only the "design" of the replacement part need be identical to the "design" of the original part. Thus, the drawings used to portray that design might be substantially different, and conceivably, the manner in which Pyromet and TK render their design drawings could divulge proprietary information about their "reverse engineering" techniques.[1]

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[1] Reverse engineering is the process by which an engineer takes an already existing product and works backwards to recreate its design and/or manufacturing process.

In any event, the FAA conceded at oral argument that it is willing to assume that the design drawings submitted by Pyromet and TK are identical in all respects to the drawings contained in the type certificates held by Pratt & Whitney. Therefore, for the purpose of this appeal, we will hypothesize that the Pyromet and TK design drawings are functionally indistinguishable from the P & W design drawings. Proceeding from that assumption, then, Pratt & Whitney argues that the information contained in the Pyromet and TK design drawings cannot be "confidential" *as to Pratt & Whitney* within the meaning of FOIA Exemption 4.

Pratt & Whitney, however, misconstrues the scope of that provision. Exemption 4 covers information that is not merely confidential as to the requester, but confidential as to the general public. It is a basic principle under FOIA that the individuating circumstances of a requester are not to be considered in deciding whether a particular document should be disclosed. All requesters are considered to have equal rights of access. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975). "[A FOIA requester's] rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the [withheld documents] greater than that shared by the average member of the public." *Id.* As Professor Davis explained, "The Act's sole concern is with what must be made public or not made public." Kenneth Culp Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 765 (1967).[2] Therefore,

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[2] Professor Davis argues persuasively that the text of the statute and its legislative history uniformly support the FOIA principle of equal access. Davis, *supra*, at 765-66.

the circumstance that Pratt & Whitney already has knowledge of the information contained in the withheld documents is irrelevant. The proper inquiry is not whether the documents are confidential as to Pratt & Whitney, but whether they are confidential in general.

Pratt & Whitney "freely concedes" that it cannot prevail if it must proceed under FOIA Exemption 4 as if it were any other member of the general public. *See* Appellant's Br. at 23. Pratt & Whitney, however, relies on the Supreme Court's decision in *United States Department of Justice v. Julian*, 486 U.S. 1 (1988), for the proposition that confidentiality under Exemption 4 should be examined on a requester-specific basis. In *Julian*, the Supreme Court crafted a narrow exception to the general rule that all individuals should have equal rights of access under FOIA. The plaintiffs in *Julian* were prisoners who sought disclosure of their own presentence investigation reports ("PSIs"). The Government responded by arguing that the PSIs were protected under Exemption 5, which prohibits disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." *See* 5 U.S.C. § 552(b)(5) (1994). Since the PSIs were normally privileged from civil discovery, therefore, according to the Government, Exemption 5 prohibited their disclosure under FOIA.

The Supreme Court began its analysis in *Julian* by noting that "in both civil and criminal cases the courts have been very reluctant to give *third parties* access to the presentence investigation report prepared for some other individual or individuals." *Julian*, 486 U.S. at 12, (emphasis in original). Such refusals were based on the

rationale that PSIs are normally not discoverable. The Supreme Court believed that a different rule, however, was appropriate "when the individual requesting discovery is the *subject* of the report." *Id.* (emphasis added). In that situation, the discovery privilege would not be applicable. Thus, the Supreme Court found "good reason to differentiate between a government claim of privilege . . . when a third party is making the request and such a claim when the request is made by the subject of the report." *Id.* at 14.

Pratt & Whitney cites *Julian* as an example where the Supreme Court has departed from its previously strict rule that the identity of the requester is irrelevant to a FOIA request, *see Julian*, 486 U.S. at 15, 17-20 (Scalia, J., dissenting). Even so, however, nothing in *Julian* supports the claim raised by Pratt & Whitney that confidentiality under Exemption 4 should be considered on a requester-specific basis in all cases. At most, the Court in *Julian* differentiated between a requester who is the "subject" of the documents and all other "third-party" requesters. Since only the former group of individuals would have any claim of special access under *Julian*, Pratt & Whitney, which falls into the latter group, cannot benefit from that decision.

The Supreme Court has subsequently explained its holding in *Julian* and reiterated the basic principle that all third-party requesters are to be considered equally under FOIA. *See United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). In *Reporters Committee*, the Supreme Court emphasized its original view that "Congress 'clearly intended' the FOIA 'to give any member of the public as much right to

disclosure as one with a special interest [in a particular document].' " *Id.* at 771 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 149); *see also id.* at 772, (whether a document must be disclosed "turn[s] on the nature of the *requested document* and its relationship to the basic purpose of the Freedom of Information Act. . . . ") (emphasis added). The Supreme Court also explained that *Julian* applies only where the Government's "objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege. . . . " *Id.* at 771. In all other cases, "the identity of the requesting party has no bearing on the merits of his or her FOIA request." *Id.*

Since Pratt & Whitney is not the party for whom the protections of Exemption 4 were intended, it has no claim of special access. *See Reporters Committee*, 489 U.S. at 771; *see also Schiffer v. FBI*, 78 F.3d 1405, 1410-11 (9th Cir. 1996) (fact that requester knew "much of the information" contained in requested documents did not support claim of special access). If any party has such a claim, it would be *only* Pyromet or TK.[3]

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[3] Pratt & Whitney makes much of the fact that, prior to litigation, the FAA disclosed certain requested documents to Pratt & Whitney that contained proprietary information. That information, however, was proprietary to *Pratt & Whitney* and indicated so on its face. Any disclosure, therefore, might have been proper under *Julian* since the requester was the "subject" of those documents. By contrast, here, the withheld documents indicate on their face that they are proprietary to Pyromet or TK. In any event, even if the FAA was not authorized under *Julian* to disclose P & W proprietary information to Pratt & Whitney, that in no way supports the contention that the FAA should compound its error by committing further improper disclosures.

Additionally, our view of Exemption 4 accords with the established test for determining whether a document is "confidential" under the exemption. The seminal case in this regard is *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). In *National Parks*, the D.C. Circuit set forth an alternative two-part test for determining whether a particular document is "confidential" under Exemption 4:

> [C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

National Parks, 498 F.2d at 770; *see also Continental Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977) (adopting *National Parks*).

Notably, the test outlined in *National Parks* does not appear to contemplate its application on a requester-specific basis. Indeed, it would be quite impractical to assert that the proper inquiry is whether there would be "substantial harm" if the document were to be disclosed *to a particular requester*. Under that rule, the Government would be required in every FOIA case to conduct an inquiry regarding the identity of the requester and the circumstances surrounding its request. The FOIA was not intended to be applied on such an individualized basis. "Congress [ ] created a scheme of categorical exclusion; it did not invite a judicial weighing of the benefits and evils

of disclosure on a case-by-case basis." *FBI v. Abramson*, 456 U.S. 615, 631 (1982).

Instead, as would be expected under the analysis in *Reporters Committee*, the appropriate inquiry under *National Parks* is whether there would be substantial harm if the documents were to be disclosed *to the general public*. Pratt & Whitney does not contest the District Court's finding that substantial harm would accrue to Pyromet and TK if the documents were to be disclosed to the public. Therefore, Pratt & Whitney cannot prevail.[4]

The judgment of the District Court is affirmed.

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[4] We do not imply here that the withheld documents can never be obtained by Pratt & Whitney. It may be the case that they are discoverable in civil litigation; however, the FOIA was not intended to serve as a substitute for discovery.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED TECHNOLOGIES CORPORATION, by its division PRATT & WHITNEY,

-Plaintiff

- v -

FEDERAL AVIATION ADMINISTRATION,

-Defendant

CIV. 3:93CV1223(TFGD)

(Filed Oct. 19, 1994)

MAGISTRATE JUDGE'S OPINION

Cross-motions for summary judgment are pending in this action under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), to compel the Federal Aviation Administration ("FAA") to release certain documents which Pratt & Whitney contends have been improperly withheld. The two central questions before the court are whether the document searches conducted by the FAA were adequate, and whether the documents which the FAA has declined to produce are properly withheld pursuant to FOIA's Exemption Four. For the reasons that follow, the cross-motions are denied on the instant record, the court finding that the FAA has failed to sustain its burden of showing that its document search was adequate.

I.

The standards governing summary judgment in FOIA actions are no different from those governing summary judgment in other cases. Under Fed.R.Civ.P. 56, summary judgment is appropriate only where the moving party sustains its burden of showing both that there are no disputed issues of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The failure to establish either of these things, or to dispel uncertainty as to the true state of the material facts, defeats a Rule 56 motion. *Quinn v. Syracus Model Neighborhood Corp.*, 613 F.3d 438, 455 (2d Cir. 1980).

Similarly, "[i]f the party opposing summary judgment 'generates uncertainty as to the true state of the material fact, the procedural weapon of summary judgment is inappropriate.' " *National Union Fire Insurance Co. v. Turtur*, 892 F.3d 199, 203 (2d Cir. 1989). The "mere existence of factual issues – where those issues are not material to the claims before the court – will not suffice to defeat a motion for summary judgment." *Quarles v. General Motors Corp. (Motors Holding Div.)*, 758 F.2d 839, 840 (2d Cir. 1985).

In considering a motion for summary judgment, the court's function is not to resolve factual issues, but merely to determine as a threshold matter whether there are unresolved issues of material fact which preclude granting relief under Rule 56. *Hayman v. Commerce and Industry Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975). When making this determination, "[a]ll reasonable inferences and any ambiguities are drawn in favor of the non-

moving party." *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir. 1990). An examination of the papers submitted in connection with the pending motions makes it clear that, on the present record, unresolved issues of fact prevent the court from entering summary judgment on the issue of adequacy of the searches.

II.

In passing on the adequacy of an agency's search for documents responsive to a FOIA request, the court must view the facts in a light most favorable to the FOIA requester and is not free to construe in the agency's favor affidavits that contain ambiguous, vague, or imprecise language. *Id.*

> What the agency must show beyond material doubt is that it has conducted a search reasonably calculated to uncover all relevant documents. As we have recently made clear, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (per curiam) (emphasis in original); see *Goland v. CIA*, 607 F.2d 339, 367, 369 (D.C.Cir. 1979) (per curiam on motion to vacate and petition for rehearing), *cert. denied*, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980). The adequacy of an agency's search is measured by a "standard of reasonableness," and is "dependent upon the circumstances of the case," *Founding Church of Scientology* [v. *NSA*, 610 F.2d 824, 834]. The government may rely upon affidavits to show it has conducted a reasonable search, so

> long as they are " 'relatively detailed' and non-conclusory and . . . submitted in good faith." (Citations omitted).

Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983); also see *Weisberg v. United States Dep't of Justice*, 627 F.2d 365, 370 (D.C. Cir. 1981).

In an opinion handed down after the preparation of the affidavits that the FAA relies upon to establish the adequacy of the document searches in this case, the Fourth Circuit made the following observations regarding affidavits.

> In judging the adequacy of an agency search for documents the relevant question is not whether every single potentially responsive document has been unearthed, *see, e.g., Perry v. Block*, 684 F.2d 121, 128 (D.C.Cir. 1982), but whether the agency has "demonstrated that it has conducted a 'search reasonably calculated to uncover all relevant documents.' " *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (*quoting Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983)). In demonstrating the adequacy of its search, however, an agency may not rest on an affidavit that simply avers that the search was conducted in a manner "consistent with customary practice and established procedure." Rather, the affidavit must be reasonably detailed, "setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched" so as to give the requesting party an opportunity to challenge the adequacy of the

search. *Oglesby v. United States Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Ethyl Corp. v. U.S.E.P.A., 25 F.3d 1241, 1247 (4th Cir. 1994).

Mere speculation that other records may exist elsewhere will not undermine a finding that an agency's search for documents was adequate. *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). However, an agency cannot limit its search to only one location if there are other repositories whose search would be likely to turn up responsive documents. *Oglesby v. U.S. Dep't. of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Thus, where an agency's search is confined to one location only, an affidavit should attest either that the location searched is the only location likely to have responsive records, or that the other possible locations are not likely to have records different from those at the location which has been searched. *Id.* Similarly, an agency's affidavit should attest that all files likely to contain responsive documents have been searched. *Id.*

In connection with the Pyromet search that was conducted in this case, the affidavits of Bernadine Kamali and Tomaso DiPaolo must be examined. *See* Exhibits B and D to the FAA's motion. While Ms. Kamali's affidavit attests that the Chicago ACO "has custody of the FAA's records" pertaining to the PMAs issued to Pyromet, the affidavit does not assert that Chicago is the only place where responsive records are likely to be, nor does it attest that responsive records are not likely to be at any location other than the Chicago ACO. The Kamali affidavit does not attest that all records likely to contain responsive records have been searched.

The affidavit of Mr. DiPaolo does not cure these deficiencies. While the DiPaolo affidavit attests that Mr. DiPaolo has no reason to believe that there are additional records in any other files within the Chicago ACO (DiPaolo ¶ 10), this does not mean that there are not responsive documents at locations other than Chicago.

The court cannot read into the FAA's affidavits factual assertions which are not fairly expressed by the language of those affidavits. Nor can the court construe in the FAA's favor the ambiguities which those affidavits contain. If, indeed, the Chicago ACO is the only place likely to contain responsive documents, or if the other possible locations are not likely to contain responsive documents, it would appear easy enough for the FAA to so attest in plain English. The affidavits do not do so at the present time.

Essentially the same is true with respect to the affidavits submitted in an attempt to establish the adequacy of the Turbine Kinetics search which the FAA conducted.

III.

Until the issue of the adequacy of the searches is resolved, the court declines to further address the motions for summary judgment on the issue of the propriety of the FAA's withholding of documents. Those cross-motions are denied without prejudice to their renewal and supplementation, if necessary, after the adequacy of the search issue has been determined. The FAA may within 45 days of this date file new, supplemental and/or curative affidavits on the adequacy issue. New cross-motions on the adequacy issue may be filed within

30 days thereafter. Nothing herein is intended to prohibit Pratt & Whitney from filing its own supplemental papers should it desire. The clerk shall mark filings 22 and 46 as denied without prejudice.

Either side may timely seek an Article III judge's review of this recommendation. 28 U.S.C. § 636(b).

Dated at Hartford, Connecticut, this 19th day of October, 1994.

/s/ Thomas P. Smith
THOMAS P. SMITH
U.S. MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED TECHNOLOGIES CORPORATION, by its division PRATT & WHITNEY,

-Plaintiff

CIV. 3:93CV1223(TFGD)

- v -

FEDERAL AVIATION ADMINISTRATION,

-Defendant

January 9, 1995. Civ. No. 3:93CV01223 (TFGD).

After careful review, absent objection, and in light of the defendant's January 4, 1995 filed motion for partial summary judgment, Magistrate Judge Smith's Recommended Ruling is hereby AFFIRMED, APPROVED and ADOPTED.

SO ORDERED.

/s/ Gilroy Daly
T.F. Gilroy Daly, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED TECHNOLOGIES CORPORATION, by its division PRATT & WHITNEY,

Plaintiff,

v.

CIVIL NO. 3:93-1223 (TFGD)

FEDERAL AVIATION ADMINISTRATION,

(Filed Apr. 4, 1995)

Defendant.

RECOMMENDED RULING ON MOTIONS FOR SUMMARY JUDGMENT

Cross-motions for partial summary judgment (filings 66 & 69) are pending in this action under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), to compel the Federal Aviation Administration ("FAA") to release certain documents which Pratt & Whitney contends have been improperly withheld. The issue currently before the court is whether the document searches conducted by the FAA were adequate.

For the reasons stated below, the defendant's motion for partial summary judgment should be **GRANTED**, and the plaintiff's cross-motion should be **DENIED**.

I. FACTS

After an examination of the complaint, affidavits, and other pleadings filed in this matter, the court finds the

following undisputed facts. The defendant is a government agency charged with responsibility for safety in air commerce. As such, it is required to approve the design of any aircraft engine or engine part submitted to it for approval if the design of the engine or part meets the applicable standards established by agency regulation. The plaintiff is a manufacturer of aircraft engines and has submitted to the defendant a great deal of design information concerning those engines.

The plaintiff competes with Pyromet Industries, Inc. ("Pyromet") of Muncie, Indiana and Turbine Kinetics, Inc. ("Turbine Kinetics") of Glastonbury, Connecticut, among others, in the sale of replacement parts for its engines. Both Pyromet and Turbine Kinetics have obtained Parts Manufacturer Approvals ("PMAs") from the defendant for certain aircraft replacement parts on the basis that such parts are identical to parts manufactured by the plaintiff.

On or about November 8, 1991, the plaintiff submitted two FOIA requests to the defendant, seeking the administrative record and other information relied upon by the defendant in issuing PMAs to both Turbine Kinetics and Pyromet. The Pyromet request was answered by the defendant's Central Region, and the Turbine Kinetics request was answered by the defendant's New England Region.

Each of the Pyromet PMA applications which are the subject of this FOIA request contained both a Pyromet drawing and a Pratt & Whitney drawing. These applications were processed by the FAA's Chicago Aircraft Certification Office ("Chicago ACO"), which generates all

PMA application approval letters in the region. According to the defendant, the Chicago ACO also returns all design drawings to the applicants. Therefore, the defendant asserts that the Pratt & Whitney drawings were not in its files at the time of the FOIA request because they were returned to Pyromet, in accordance with standard procedure, after issuance of the PMA.

Each of the Turbine Kinetics PMA applications also contained engineering drawings for the parts. These applications were reviewed and approved by the FAA's Burlington, Massachusetts Directorate. According to the defendant, after approval of each Turbine Kinetics application, the following were forwarded to the FAA's Windsor Locks Manufacturing Inspection District Office ("Windsor Locks MIDO"): (1) the PMA Supplement; (2) the set of Turbine Kinetics drawings submitted with the PMA application; and (3) the corresponding Pratt & Whitney drawings submitted with the application.

After receiving the aforementioned documents, the Windsor Locks MIDO routinely generates an approval letter and returns to the PMA applicant all design drawings submitted with the application. While the defendant's motion was pending, the Windsor Locks MIDO conducted a search of its files and found no drawings present. The only documents retained by the Windsor Locks MIDO are copies of the PMA Supplement, the approval letter generated by the MIDO, and the original memorandum from the Burlington Directorate.

With regard to both the Pyromet and Turbine Kinetics requests, the plaintiff alleges that the defendant has not adequately searched its files and offices for the Pratt &

Whitney design drawings submitted with each of the PMA applications.

II. STANDARD

Rule 56(c) states in pertinent part, "the motion [for summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), the Court stated that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery upon motions, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." All ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 249 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987).

III. DISCUSSION

The standard for granting summary judgment in FOIA disclosure cases is well established. "To meet its burden to show that no genuine issue of material fact exists, with the facts viewed in the light most favorable to the requester, the agency must demonstrate that it has conducted a 'search reasonably calculated to uncover all relevant documents.' " *Weisburg v. Dep't of Justice*, 745

F.2d 1476, 1485 (D.C. Cir. 1984), *quoting Weisburg v. Dep't of Justice*, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983).

The dispositive issue is not whether any other documents possibly responsive to the request exist, "but rather whether the *search* for those documents was *adequate*." *Weisburg*, 745 F.2d at 1485 (emphasis in original). The adequacy of the search is judged by a reasonableness standard, taking into consideration the facts of each case. *Id.*

To demonstrate the adequacy of its search, the agency may rely upon affidavits submitted in good faith. *Id.; see Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1979) (per curiam), *cert. denied*, 445 U.S. 927 (1980). However, "the affidavit[s] must be reasonably detailed, 'setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched' so as to give the requesting party an opportunity to challenge the adequacy of the search." *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1246 (4th Cir. 1994), *quoting Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

At a minimum, an agency affidavit should describe with reasonable specificity the scope and method by which the search was conducted. *Maynard v. CIA*, 986 F.2d 547, 559 (1st Cir. 1993).

> If an agency fails to establish through reasonably detailed affidavits that its search was reasonable, the FOIA requester may avert summary judgment merely by showing that the agency might have discovered a responsive document had the agency conducted a reasonable search. *Id.* at 560. However, if an agency demonstrates

> that it has conducted a reasonably thorough search, the FOIA requester can rebut the agency's affidavit only by showing that the agency's search was not made in good faith. *Id.*

An agency's affidavit is accorded a presumption of good faith. *Id.* Mere speculation that other records may exist elsewhere will not undermine a finding that an agency's search for documents was adequate. *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). However, an agency cannot limit its search to only one location if there are other repositories whose search would be likely to turn up responsive documents. *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Therefore, where an agency's search is confined to only one location, an affidavit should attest either that the location searched is the only location likely to have responsive records, or that the other possible locations are not likely to have records different from those at the location which has been searched. *Id.* In addition, an agency's affidavit should attest that all files likely to contain responsive documents have been searched. *Id.*

In connection with the Pyromet search that was conducted in this case, the affidavit and supplementary declaration of Thomas DiPaolo must be examined. Mr. DiPaolo's supplementary declaration states that all Pyromet PMA applications are filed in the Chicago ACO's "Pyromet Correspondence, Specifications, or Drawings file." DiPaolo Supplementary Declaration, ¶ 2 (filing no. 62). He attests that there are no other places in the Chicago ACO or in any other FAA facilities for filing such documents. *Id.* at ¶ 1. Mr. DiPaolo states that he assisted in searching the three Pyromet files in response

to the plaintiff's FOIA request and that no Pratt & Whitney design drawings were found. *Id.* at ¶ 2.

While reviewing the files prior to the making of his supplementary declaration, Mr. DiPaolo discovered several additional Pyromet drawings and documents responsive to the plaintiff's FOIA request. *Id.* at ¶¶ 11, 14. These drawings have been identified to the plaintiff, but withheld as exempt, although the documents have been released to the plaintiff. The plaintiff argues that this oversight by the defendant lends support to its claim that the FAA's search was inadequate. However, a search is not deemed unreasonable merely because it fails to produce all relevant material. *Meeropol v. Meese*, 790 F.2d 942, 952-53 (D.C. Cir. 1986). "It would be unreasonable to expect even the most exhaustive search to uncover *every* responsive file; what is expected of a law-abiding agency is that it admit and correct error when error is revealed." *Id.* at 953. This is exactly what the defendant has done. The supplemental disclosure suggests "a stronger, rather than a weaker, basis for accepting the integrity of the search." *Id.*

In reviewing the adequacy of the Turbine Kinetics search, it is necessary to examine the affidavits and supplementary declarations of Robert Guyotte and Albert Pereira. According to Mr. Guyotte, his staff searched the Burlington Directorate file room for files pertaining to the Turbine Kinetics applications for PMA. Guyotte Affidavit, ¶ 13 (filing no. 23). No Pratt & Whitney design drawings were retained by the Directorate. Guyotte Supplementary Declaration, ¶ 4 (filing no. 62). Mr. Guyotte states that there is no other place in any FAA office for filing documents pertaining to the engineering approval of a PMA

application processed by the Burlington Directorate, except for a copy of the PMA Supplement filed in the Windsor Locks MIDO. *Id.* at ¶ 3.

Following the processing of the Turbine Kinetics applications, Mr. Guyotte alleges that the drawings in question were forwarded to the Windsor Locks MIDO, which in turn, returned the drawings to Turbine Kinetics. *Id.* at ¶¶ 5, 7. The Windsor Locks MIDO retained only a copy of the PMA Supplement along with a copy of its transmittal letter to Turbine Kinetics. *Id.* at ¶ 7; Pereira Affidavit, ¶¶ 5, 7 (filing no. 79). According to Mr. Pereira, he conducted a search of the PMA approval files in the Windsor Locks MIDO and was unable to find any design drawings submitted by Turbine Kinetics. Pereira Affidavit, ¶ 8. He also states that there is no other place in his office where PMA documents relating to the Supplements would be kept. *Id.* at ¶ 11.

The FAA's affidavits and supplementary declarations cure deficiencies in earlier affidavits noted by this court. These documents adequately describe the agency's search. Once the defendant established through sworn affidavits that no undisclosed documents regarding the plaintiff's request were contained in its relevant files, the plaintiff was obligated to controvert that showing. *Marks v. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978). The court finds that the plaintiff has failed to meet this burden.[1] "[C]onclusory allegations unsupported by factual

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[1] The plaintiff argues that the defendant should have searched the individual work files of the FAA personnel who processed the relevant PMA requests. However, the plaintiff offers no factual support for its contention that employees may

data will not create a triable issue of fact." *Id., citing California ex rel. Dep't of Transportation v. United States, Etc.*, 561 F.2d 731, 733 n.4 (9th Cir. 1977).

After a review of all the affidavits and declarations, the court finds that with regard to both the Pyromet and Turbine Kinetics search requests, all files likely to contain responsive documents have been searched. The documents claimed to be missing are those which have apparently been returned to the PMA requesters in accordance with routine procedures. The existence of these documents within current FAA files remains purely a matter of unsupported speculation, leaving the court to conclude that the searches conducted by the FAA were adequate.

IV. CONCLUSION

For all the foregoing reasons, the defendant's motion for partial summary judgment (filing 66) should be **GRANTED,** and the plaintiff's cross-motion (filing 69) should be **DENIED.**

Either party may seek review of this report and recommendation as provided in 28 U.S.C. § 636(b) (written objections to recommended ruling must be filed within ten days of service of the same); Fed.R.Civ.P. 6(a), 6(e), & 72; and Rule 2 of the Local Rules for United States Magistrate Judges (D. Conn.). Failure to object in a timely manner may preclude further review. *Small v. Secretary of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989).

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have copies of responsive records, and in light of the defendant's strong assertions to the contrary, the court finds this argument unpersuasive.

Dated at Hartford, Connecticut this 4th day of April, 1995.

/s/ Thomas P. Smith
Thomas P. Smith
United States
Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED TECHNOLOGIES CORPORATION, by its division PRATT & WHITNEY,

Plaintiff,

- v -

FEDERAL AVIATION ADMINISTRATION,

Defendant.

CIV. 3:93-1223(TFGD)

(Filed Apr. 04, 1995)

May 25, 1995. Civ. No. 3:93CV01223 (TFGD).

After careful review and absent objection, Magistrate Judge Smith's Recommended Ruling is hereby AFFIRMED APPROVED AND ADOPTED.

SO ORDERED.

/s/ T.F. Gilroy Daly
T. F. Gilroy Daly, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED TECHNOLOGIES CORP., BY ITS DIVISION, PRATT AND WHITNEY,

plaintiff,

-v-

FEDERAL AVIATION ADMINISTRATION,

defendant.

Civ.No. 3:93CV01223

(Filed Nov. 2, 1995)

RULING ON RENEWED CROSS MOTIONS FOR SUMMARY JUDGMENT

This is a Freedom of Information Act (FOIA), 5 U.S.C. § 552, action in which the plaintiff seeks to compel the defendant, the Federal Aviation Administration (FAA), to release certain documents which the plaintiff contends have been improperly withheld. On previously filed motions for summary judgment, the court bifurcated its decision on two issues in the case: 1) whether the defendant conducted adequate searches with respect to the plaintiff's requests for FOIA information; and 2) whether the defendant properly withheld certain documents and portions of documents from the plaintiff pursuant to FOIA exemption four. On April 4, 1995, the court decided the first issue, concluding that the defendant's search of its records was legally adequate and granting summary judgment in favor of the defendant on that issue. The parties have renewed their respective motions for summary judgment with respect to the exemption four issue, which is now ripe for decision.

For the reasons that follow, the defendant's motion should be **GRANTED** and the plaintiff's motion should be **DENIED**.

FACTS

Examination of the pleadings and the relevant motions, memoranda and affidavits filed in connection with the instant renewed cross motions for summary judgment reveals the following undisputed material facts. The defendant, the Federal Aviation Administration (FAA) is a government agency responsible for safety in air commerce. As such, the FAA must approve the design of any aircraft engine or engine part submitted to it for approval, if the design or part meets the applicable standards set forth in the agency regulations. The plaintiff, United Technologies, by its division Pratt & Whitney ("Pratt"), manufactures aircraft engines and has submitted design information to the defendant.

On November 8, 1991, the plaintiff submitted two FOIA requests to the defendant, seeking documents related to Pyromet Industries, Inc. ("Pyromet") and Turbine Kinetics, Inc. ("Turbine"), two competitors of the plaintiff. These documents contain information which Turbine and Pyromet submitted to the FAA in order to

obtain Part's Manufacturer Approvals (PMA)[1] to manufacture and market certain replacement parts for aircraft engines. The FAA has refused to turn over certain of the requested documents, claiming that the information contained therein is protected under 5 U.S.C. § 552(b)(4), the "trade secrets and confidential commercial information" exemption.[2]

The plaintiff and defendant previously filed cross motions for summary judgment. On October 19, 1994, the court denied both motions without prejudice to their renewal. The plaintiff and defendant subsequently filed partial motions for summary judgment on the issue of the adequacy of the defendant's search for records. On April 4, 1995, the court granted the defendant's motion and denied the plaintiff's motion. Presently before the court are the parties renewed cross motions for summary judgment on the issue of whether the defendant is properly withholding documents under FOIA's exemption four.

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[1] In his affidavit, Robert E. Guyotte, an Aerospace Engineer at the FAA, explains that, "[b]efore a person other than the type certificate holder or its licensees can legally produce replacement parts for sale for installation on type certified engines the person must obtain a Parts Manufacturer Approval (PMA) from the FAA." *See* 14 C.F.R. § 21.303.

[2] The defendant released approximately two hundred pages of information and withheld forty pages in full, 11 pages in part and eight engineering drawings.

STANDARD

The standards governing summary judgment in FOIA actions are no different from those governing summary judgment in other cases. In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A dispute regarding a material fact is genuine " 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir. 1992) (quoting *Anderson*, 477 U.S. at 248). "If the party opposing summary judgment 'generates uncertainty as to the true state of the material fact, the procedural weapon of summary judgment is inappropriate.' " *National Union Fire Insurance Co. v. Turtur*, 892 F.3d 199, 203 (2d Cir. 1989) (quoting *Beacon Enters., Inc., v. Menzies*, 715 F.2d 757, 762 (2d Cir. 1983); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980)). However, the "mere existence of factual issues – where those issues are not material to the claims before the court – will not suffice to defeat a motion for summary judgment." *Quarles v. General Motors Corp. (Motors Holding Div.)*, 758 F.2d 839, 840 (2d Cir. 1985).

After discovery, if there are no disputed issues of material fact and the non-moving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then summary judgment is appropriate. *Celotex, supra* 477 U.S. at 323. The court resolves "all ambiguities and

draw[s] all inferences in favor of the non-moving party in order to determine how a reasonable jury would decide." *Aldrich*, 963 F.2d at 523. Thus, "[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 152 (1991). *See also Suburban Propane v. Proctor Gas, Inc.*, 953 F.2d 780, 788 (2d Cir. 1992).

DISCUSSION

FOIA "sets forth a policy of broad disclosure of Government documents in order 'to insure an informed citizenry, vital to the functioning of a democratic society.' " *Federal Bureau of Investigation v. Abrahamson*, 456 U.S. 615, 621 (1982) (quoting *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The statute recognizes several exceptions to this general policy. These exceptions, however, are to be construed narrowly. *United States Department of Justice*, 486 U.S. 1, 8 (1988); *Abrahamson*, 456 U.S. at 630. "FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.' 5 U.S.C. § 552(a)(4)(B)." *Ferguson v. Federal Bureau of Investigation*, 957 F.2d 1059, 1070 (2d Cir. 1992) (citing *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 755 (1989)). The FAA must prove the applicability of exception four to the information at

issue in order to sustain its burden. 5 U.S.C. § 552(a)(4)(B).[3]

I. Special Access – Department of Justice v. Julian

The plaintiff's argument with respect to certain "identicality"[4] information is based upon the Supreme Court's holding in *Department of Justice v. Julian*, 486 U.S. 1 (1988). Essentially, the plaintiff claims that it has a special entitlement to some of the material because in granting the PMAs, the FAA found the designs of Pyromet Turbine to be "identical" to Pratt's designs.[5] Therefore, the plaintiff argues, disclosure *to Pratt* could not cause legitimate competitive harm to Pyromet and Turbine. The plaintiff cites the Supreme Court's holding

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[3] Section 552(a)(4)(B) provides in relevant part as follows:

> (B) On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint. In such a case the court shall determine the matter de novo . . . and the burden is on the agency to sustain its action.

5 U.S.C. § 552(a)(4)(B).

[4] A PMA applicant may base its request for approval upon a claim that its part is identical to a part that was previously approved through the FAA's type certification process. *See* Affidavit of Robert E. Guyotte, Attachment A of Defendant's Memorandum in Opposition; *see also* Federal Aviation Regulations, 14 C.F.R. § 21.303(c)(4).

[5] The FAA granted the PMA applications of Pyromet and Turbine based upon the "identicality" of their designs to Pratt's previously approved designs.

in *Julian*, for the proposition that under certain circumstances particular persons requesting information will have a right to disclosure apart from that of the general public. The defendant responds that *Julian* does not provide the plaintiff with a special right of access to the material at issue.

In *Julian*, the Supreme Court held that an individual who requests his presentence report ("PSI"),[6] prepared in connection with criminal charges against him, is entitled to disclosure of the report. *Id.* at 14. The Court held that neither exemption three, nor exemption five of FOIA provided a basis for withholding the plaintiff's PSI from him. *Id.* at 11, 14. The plaintiff had a personal right to disclosure of the report with the exception of those portions which were specifically exempted by statute, to wit, any information relating to confidential sources, diagnostic opinions and other information that might cause harm to the criminal defendant or third parties. *Id.* at 9. Although under FOIA inviduating characteristics of a requester are not considered material to an agency's decision to disclose or withhold information, *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), the Court in *Julian* carved out a narrow exception under which the identity of certain requesters is properly taken into consideration.

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[6] These reports are "prepared by a probation officer for use by the district court at sentencing; they contain background information about a defendant and the circumstances of his offense." *Julian*, 486 U.S. at 3.

Julian, 486 U.S. at 14. The plaintiff cites the Court's reasoning to argue that Pratt is entitled to special access with respect to the "identicality" information at issue.

In *Julian*, the Court recognized that disclosure of the PSI to the subject of the report was consistent with statutory authority governing disclosure of such reports. In that case, the Court found "good reason to differentiate between a governmental claim of privilege for presentence reports when a third party is making the request and such a claim when the request is made by *the subject of the report.*" *Id.* at 14 (emphasis added). In the instant case, however, there is not a legally sufficient reason to make such a distinction.

The Court revisited the issue of special access to documents under FOIA in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). In *Reporters Committee*, the Court held that disclosure of an FBI "rap sheet"[7] to a third party was prohibited by FOIA's law enforcement exception. With respect to the right of certain requestors to gain access to information apart from any public right to know, the court stated that

> [e]xcept for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the

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[7] The Federal Bureau of Investigation compiles and maintains "rap sheets," or criminal identification records, on millions of people. These records contain both descriptive information and a history of an individual's arrests, charges, convictions, and incarcerations. *See Reporters Committee*, 489 U.S. at 751-52.

> requesting party has no bearing on the merits of his or her FOIA request.

Id. at 771. The Court went on to note that, "Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document].' " *Id.* (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)). " 'The Act's sole concern is with what must be made public or not made public.' " *Reporters Committee*, 489 U.S. at 772 (quoting Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 765 (1966-67)). The Court has recognized an exception to this general principle in a situation where "the subject of a presentence report can waive a privilege that might defeat a third party's access to that report." *Reporters Committee*, 489 U.S. at 771 (citing *Department of Justice v. Julian*, 486 U.S. 1, 13-14 (1988)).

The plaintiff claims that disclosure of the "identicality" information could not cause competitive harm to Pyromet and Turbine because the information is identical to that which Pratt possesses. In support of its position, the plaintiff cites two cases in which the courts have applied the *Julian* rationale to other FOIA exemptions. *Fine v. DOE*, 823 F. Supp. 888, 907 (D.N.M. 1993) (applying *Julian* in the exemption 7(C) context); *Grasso v. IRS*, 785 F.2d 70, 76-77 (3d Cir. 1986) (holding, prior to the Court's decision in *Julian*, that a taxpayer's interview with IRS agents did not fall under FOIA exemption 7(A)).

In both of those cases, however, the requestor was, similar to the requestor in *Julian*, the subject of the information sought.[8]

In a footnote, the plaintiff cites to the Court's holding in *Reporters Committee*. The plaintiff notes the Court's recognition that the purpose of a FOIA request has no bearing upon whether or not the information should be disclosed. The plaintiff assures the court that it is not relying upon its motives or any special purposes in arguing a right of access to the information it seeks. Absent from the plaintiff's discussion, however, is analysis of the Court's statement that, "the identity of the requesting party has no bearing on the merits of his or her FOIA request. . . . [e]xcept for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege . . . . " *Reporters Committee*, 489 U.S. at 771. In this case, the requesting party, Pratt, is not the person intended to be protected by exemption four. Rather, the persons who submitted the information in question, Pyromet and Turbine, are those the exemption was intended to protect from disclosure. *See Bristol-Myers Co. v. F.T.C.*, 424 F.2d 935, 938, *cert. denied* 400 U.S. 824 (1970); *see also Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d

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[8] In *Fine*, the court held that confidentiality was not a concern as to the plaintiff, who was the subject of the document at issue and who had, himself, provided the information therein. *Fine*, 823 F. Supp. at 909. In *Grasso*, the court recognized that a taxpayer's interview with IRS agents was not exempt from disclosure with respect to the taxpayer where the information sought contained the requestor's own statements. *Grasso*, 785 F.2d at 77.

1190, *cert. denied* 431 U.S. 924 (1976); *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).[9]

In *Reporters Committee*, the Court limited its holding in *Julian*, which gave consideration to the identity of certain requesters, to situations in which "the person requesting disclosure is the party protected by the privilege . . . . " *Reporters Committee*, 489 U.S. at 771. This represents a narrow exception to the general principle underlying FOIA, that every member of the public should have a right to FOIA disclosure that is equal to the right of someone with a special interest in the information. *See Reporters Committee*, 489 U.S. at 771; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)). Even if the documents, or a part hereof, are identical to documents in Pratt's possession, the plaintiff has failed to prove that it should be given a special right of access, apart from public disclosure. The plaintiff is not the person sought to be protected by exemption four, and, therefore, has failed to prove that the facts of this case fall within the reasoning of *Julian* and *Reporters Committee*.

II. Exemption Four

Exemption four of FOIA provides, in relevant part, as follows:

> (b) This section does not apply to matters that are –

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[9] In *National Parks*, the court recognized that exemption four was intended to protect the interests of both the government and the individual. *National Parks*, 498 F.2d at 767.

> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . .

5 U.S.C. § 552(b)(4). The defendant asserts that this section covers all of the material withheld from the plaintiff. The plaintiff responds that the withheld documents are not confidential with respect to Pratt & Whitney, are not exempt from disclosure and, therefore, should be disclosed to the plaintiff.

The requested information must meet three conditions before it is protected from disclosure by exemption four. The information sought must be 1) "commercial or financial information;" 2) "obtained from a person;" and 3) "privileged or confidential." The first two conditions are easily satisfied and do not appear to be in dispute. The terms "commercial" and "financial" are given their ordinary meanings under FOIA. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). " 'Commercial' surely means pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. Nat. Mediation Bd.*, 588 F.2d 863 (2d Cir. 1978). The information that is the subject of the plaintiff's request involves the design and manufacture of products which Pyromet and Turbine plan to sell and, therefore, it is of commercial interest to the two corporations. *See Public Citizen Health*, 704 F.2d at 1290. Further, both Pyromet and Turbine, as corporate entities, meet the statutory definition of "persons" for purposes of this provision. *See* 5 U.S.C. § 551; *Gulf & Western Indus. v. United States*, 615 F.2d 527, 529 (D.C. Cir. 1979). Therefore, the information at issue in this action is, concededly, "commercial information" that was "obtained from a person." The issue to

be resolved is whether the information at issue meets the third prong of the exemption four test; that the information is "privileged or confidential."

The term "confidential," as it is used in 5 U.S.C. § 552(b)(4), is not statutorily defined. In *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), *aff'd in part* and *rev'd in part sub nom. National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C Cir. 1976), the Court of Appeals for the District of Columbia Circuit set forth the following widely accepted two-prong test for determining confidentiality:

> commercial of financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

National Parks, 498 F.2d at 770. The Second Circuit has recognized and adopted this test for determining the applicability of exemption four. *See Continental Stock Transfer and Trust Co. v. Securities, and Exchange Commission*, 566 F.2d 373 (2d Cir. 1977).[10] This test serves dual policies. First, with respect to the first prong, the test

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[10] The Second Circuit stated as follows:

> The District of Columbia Circuit, whose opinions construing the Freedom of Information Act are entitled to appropriate weight, has formulated a two prong test to determine whether information is confidential within the meaning of § 552(b)(4).

566 F.2d at 375. The court went on to state and apply the test. *Id.*

accommodates the government agency's own interests. Second, with respect to the second prong, the test protects the concerns of third parties. "These policies are, of course, interrelated, because the protection of third parties' interests encourages cooperation with agencies." *Nadler v. Federal Deposit Insurance Corporation*, 1995WL573692 (S.D.N.Y Sept. 19, 1995).

The District of Columbia Circuit recently reviewed the two-prong test of *National Parks. Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). In *Critical Mass*, the court reaffirmed but modified the two-prong test to apply only to "information a person was obligated to furnish the Government." *Id.* at 880. Any information provided on a voluntary basis, however, qualifies under exemption four if "it is of a kind that the provider would not customarily release to the public." *Id.* This modification is intended to promote voluntary disclosure to agencies by making it easier to prove confidentiality when the documents at issue were volunteered to the agency. *See Nadler v. Federal Deposit Insurance Corporation*, 1995WL573692 at *3 (S.D.N.Y. Sept. 19, 1995).[11]

A. Competitive Harm

With respect to records which the defendant withheld in their entirety, the defendant relies upon the second prong of the *National Parks* test and argues that disclosure of the material at issue will cause substantial

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[11] The second circuit has not commented on this modification to the *National Parks* test.

harm to the competitive position of Pyromet and Turbine. Although "[c]onclusory and generalized allegations of substantial competitive harm . . . cannot support an agency's decision to withhold requested documents," *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983), the governmental agency "need not show actual competitive harm; evidence revealing actual competition and the likelihood of substantial competitive injury is sufficient to bring commercial information within the realm of confidentiality." *Id.* (citing *Gulf & Western Industries v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979)).

In this case, the defendants have submitted affidavits which establish actual competition in the business of aircraft engine parts manufacturing. The plaintiff does not dispute this fact. The issue then is whether disclosure of the materials at issue is likely to cause Pyromet and Turbine substantial competitive injury.

In determining whether financial documents would cause the submitter substantial competitive harm, the court has recognized that "[n]o actual adverse effect on competition need be shown . . . [t]he court need only exercise its judgment in view of the nature of the material sought and the competitive circumstances . . . relying at least in part on relevant opinion testimony." *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 683 (D.C. Cir. 1976).

The Second Circuit has recognized that confidentiality under exemption four may be established if disclosure would have the effect of "causing substantial harm to the competitive position of the person from

whom the information was obtained." *Continental Stock*, 566 F.2d at 375. The defendant has submitted the affidavits of Wayne Kirschling, President of Pyromet Industries, Inc., Titus A. Casazza, president of Turbine Kinetics, Inc., and Robert Guyotte and John Fitzgerald, Jr., of the FAA, in support of its contention that release of the information at issue would cause substantial competitive injury to Pyromet and Turbine.[12] The plaintiff has offered no testimony to rebut these assertions. The testimony

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[12] Mr. Kirschling states that Pyromet's practice is to protect its "drawings and specifications from unauthorized disclosure" and that disclosure of the Pyromet documents at issue in this lawsuit would cause commercial harm to the corporation's competitive position. Mr. Casazza explains the PMA application and approval process and the nature of the documents submitted in support of Turbine's applications. He states that,

> [r]elease of information submitted to the FAA by TK in support of its PMA applications would cause TK substantial competitive harm by disclosing to its competition the very nature of the reverse engineering procedures used by TK to obtain PMA. These procedures, developed by TK at the cost of many thousands of hours and dollars are a reflection of its expertise. . . .

Mr. Casazza makes additional statements with respect to competitive harm in his "Substituted *In Camera* Affidavit," which lend further support to the defendant's substantial competitive harm analysis.

Mr. Guyotte explains the PMA application process, the circumstances surrounding the plaintiff's FOIA requests and the documents which were both disclosed to and withheld from the plaintiff. He also attests to the fact that disclosure of the redacted information would "reveal a business practice that is beneficial to [Turbine] in obtaining PMAs."

submitted by the defendant establishes a sufficient likelihood of substantial competitive harm to Pyromet and Turbine if the documents at issue[13] are released to the public. Release of the information at issue would disclose methods which Pyromet and Turbine use to engineer certain jet-engine parts. Such disclosure, to competing corporations, would cause Pyromet and Turbine to suffer substantial competitive harm in the spare parts industry. After careful review of the defendant's "Amended Vaughn Index," detailing the documents withheld in their entirety, and the relevant affidavits filed in support of the defendant's motion, the court finds that the defendant properly invoked exemption four.

B. Redacted Information

With respect to information which the defendant redacted from documents it provided to the plaintiff, the defendant argues that the rule of *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied* 113 S. Ct. 1579 (1993), applies. In *Critical Mass*, the court held that the *National Parks* test applies only to information which a person was obligated to provide to the government. As previously noted, the court recognized that information submitted voluntarily would enjoy exemption four protection "if it is of a kind that the provider would not customarily release to the public." *Id.* at 880.

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[13] The information withheld in its entirety from the plaintiff includes forty full pages of information and eight engineering drawings.

The redacted information at issue, was, according to the defendant, provided voluntarily. The defendant has submitted, for *in camera* review, the redacted information and affidavits supporting its position that the redacted portions of the documents are not the kind of information that the submitter, in this case Turbine, would ordinarily release to the public. After *in camera* review, the court concludes that the redacted information was provided voluntarily and is the type of information that Turbine would not customarily release to the public.

Even if the court of appeals were to reject the *Critical Mass* test, however, the evidence submitted supports a finding that the redacted information satisfies the competitive harm prong of *National Parks*. After *in camera* review of the redacted information itself and pertinent affidavits filed in connection with the defendant's motion, the court concludes that even under this stricter test, the redacted information was properly withheld pursuant to exemption four.[14]

CONCLUSION

For all the foregoing reasons, the defendant's motion for summary judgment (document no. 22) should be **GRANTED** and the plaintiff's motion (document no. 91) should be **DENIED**.

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[14] If disclosed, the information is likely to cause substantial competitive harm to Turbine with respect to a business practice that is beneficial in obtaining PMAs. *See* "Amended Vaughn Index"; "Substituted *In Camera* Affidavit of Titus Casazza; Affidavit of Robert E. Guyotte, Attachment A of Defendant's Memorandum in Support of Motion for Summary Judgment.

Either party may seek review of this report and recommendation as provided in 28 U.S.C. § 636(b) (providing that written objections to a recommended ruling must be filed within ten days of service of the same); Fed.R.Civ.P. 6(a), 6(e), & 72; and Rule 2 of the Local Rules for United States Magistrate Judges (D.Conn.). Failure to object in a timely manner may preclude further review. *Small v. Secretary of Health and Human Services.*, 892 F.2d 15, 16 (2d Cir. 1989).

Dated at Hartford, Connecticut this 2nd day of November, 1995.

/s/ Thomas P. Smith
Thomas P. Smith
United States Magistrate Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED TECHNOLOGIES CORP., BY ITS DIVISION PRATT AND WHITNEY,

plaintiff,

Civ.No. 3:93CV01223

-v-

FEDERAL AVIATION ADMINISTRATION,

defendant.

February 1, 1996. Civ. No. 3:93CV01223 (TFGD).

After careful review and over objection, Magistrate Judge Smith's Recommended Ruling is hereby AFFIRMED, APPROVED AND ADOPTED.

SO ORDERED.

/s/ T.F. Gilroy Daly
T. F. Gilroy Daly, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED TECHNOLOGIES CORP.,
BY ITS DIVISION, PRATT AND WHITNEY

v. 3:93CV01223 TFGD

FEDERAL AVIATION ADMINISTRATION

CORRECTED JUDGMENT

(Filed Feb. 5, 1996)

This cause came on for consideration of the parties renewed motions for summary judgment, by the Honorable Thomas P. Smith, United States Magistrate Judge and the Honorable T. F. Gilroy Daly, United States District Judge, and

The Court having considered the motion and all the papers submitted in connection therewith affirmed, approved and adopted the Magistrate Judge's recommended ruling granting the defendant's motion and denying plaintiff's motion.

It is therefore **ORDERED** and **ADJUDGED** that judgment be and hereby is entered in favor of the defendant.

Dated at Waterbury, Connecticut this 5th day of February, 1996.

KEVIN F. ROWE, Clerk

By /s/ Illegible
Deputy Clerk

5 U.S.C. § 552 – Public information; agency rules, opinions, orders, records and proceedings

(a) Each agency shall make available to the public information as follows:

* * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person

(4) * * *

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(b) This section does not apply to matters that are –

* * *

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

* * *

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

* * *

Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

* * *

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14 C.F.R. § 21.303 – Replacement and modification parts.

(a) Except as provided in paragraph (b) of this section, no person may produce a modification or replacement part for sale for installation on a type certificated product unless it is produced pursuant to a Parts Manufacturer Approval under this subpart.

* * *

(c) An application for a Parts Manufacturer Approval is made to the Manager of the Aircraft Certification Office for the geographic area in which the manufacturing facility is located and must include the following:

* * *

(3) The design of part, which consists of –

(i) Drawings and specifications necessary to show the configuration of the part; and

(ii) Information on dimensions, materials, and processes necessary to define the structural strength of the part.

(4) Test reports and computations necessary to show that the design of the part meets the airworthiness requirements of the Federal Aviation Regulations applicable to the product on which the part is to be installed, unless the applicant shows that the design of the part is identical to the design of a part that is covered under a type certificate. If the design of the part was obtained by a licensing agreement, evidence of that agreement must be furnished.

(d) An applicant is entitled to a Parts Manufacturer Approval for a replacement or modification part if –

(1) The Administrator finds, upon examination of the design and after completing all tests and inspections, that the design meets the airworthiness requirements of the Federal Aviation Regulations applicable to the product on which the part is to be installed; and

(2) He submits a statement certifying that he has established the fabrication inspection system required by paragraph (h) of this section.

* * *

(h) Each holder of a Parts Manufacturer Approval shall establish and maintain a fabrication inspection system that ensures that each completed part conforms to its design data and is safe for installation on applicable type certificated products.

* * *

Supreme Court, U.S.
FILED
MAY 23 1997
CLERK

No. 96-1518

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED TECHNOLOGIES CORPORATION,
BY ITS DIVISION, PRATT & WHITNEY, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
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QUESTION PRESENTED

Whether Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4), which allows agencies to withhold from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential," protects from disclosure documents relating to design drawings for aircraft engine replacement parts, notwithstanding the FOIA requester's assertion that it already has knowledge of the allegedly confidential information because the requested drawings are identical to drawings it previously submitted to the agency.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1518

UNITED TECHNOLOGIES CORPORATION,
BY ITS DIVISION, PRATT & WHITNEY, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 102 F.3d 688. The orders of the district court (Pet. App. 20, 31, 51) adopting the recommended rulings of the magistrate judge are unreported; the district court's corrected judgment (Pet. App. 52) is unreported. The recommended rulings of the magistrate judge (Pet. App. 13-19, 21-30, 32-50) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1996. The petition for a writ of

certiorari was filed on March 24, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before an aircraft engine may be used lawfully in civil aviation, its design must be approved by respondent, the Federal Aviation Administration (FAA). The engine manufacturer must submit to the FAA drawings, designs, and specifications for the aircraft engine and its component parts. Those specifications are considered the proprietary information of the manufacturer and are not made available by the FAA to the general public. Pet. App. 3. Upon approval of the engine, the FAA issues a "type certificate" to the manufacturer. 49 U.S.C. 44704.

Petitioner, the United Technologies Corporation, by its division, Pratt & Whitney, holds numerous type certificates for aircraft engines it has designed and built. In order for a person, other than the type certificate holder, to be able to legally manufacture and sell replacement parts for those engines, the person must obtain from the FAA a Parts Manufacturer Approval (PMA). Pet. App. 3; 14 C.F.R. 21.303. A PMA holder may manufacture and sell approved replacement parts directly to the owners of the aircraft engines on which the parts are to be installed. Pet. App. 3.

One method of obtaining a PMA is to demonstrate that the design of the replacement part is identical to the design of the original part that is covered under a type certificate. 14 C.F.R. 21.303(c)(4). After an applicant for such a PMA submits drawings and specifications for its part, the FAA compares them to data regarding the original part, considers other

relevant data, and determines whether the PMA part "will be an adequate replacement for the original part as to fit, form, and function." Pet. App. 3-4. If the replacement part meets the FAA's standards, it issues the replacement part manufacturer an identicality PMA.

2. In letters dated November 8, 1991, petitioner filed requests under the Freedom of Information Act (FOIA), 5 U.S.C. 552, with the FAA seeking disclosure of documents relating to two companies—Pyromet Industries and Turbine Kinetics—that compete with petitioner in the sale of replacement parts. Specifically, petitioner requested disclosure of the documents the two companies had submitted in order to obtain their identicality PMAs to manufacture and sell certain replacement parts for petitioner's aircraft engines. Pet. App. 4, 33-34.[1]

The FAA disclosed approximately 200 pages of documents in their entirety, and withheld approximately 40 pages in their entirety, 11 pages in part, and eight engineering drawings. Pet. App. 4, 34 n.2. The FAA indicated that it was withholding the documents and parts thereof under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), which permits an agency to withhold "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." Pet. App. 4. The FAA rejected petitioner's administrative appeal, specifically disagreeing with petitioner's contention that any information submitted by a PMA applicant under the identicality

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[1] Petitioner claimed that it had reason to believe that its proprietary information was being used by certain PMA applicants to improperly obtain PMAs for replacement parts. Pet. App. 4.

provision is, by definition, non-confidential to the person who holds the type certificate for the original engine. *Id.* at 5.

3. Petitioner filed the instant action in June 1993, in the United States District Court for the District of Connecticut, seeking disclosure of the withheld documents. Pet. App. 5. The court referred the matter to a magistrate judge, and the parties filed cross-motions for summary judgment. *Ibid.*

The district court ultimately approved and adopted the magistrate's recommended ruling granting the FAA's motion for summary judgment and denying petitioner's cross-motion. See Pet. App. 32-52. The court rejected petitioner's contention that it has a special right of access to the requested documents by virtue of the fact that the FAA found that the designs therein were "identical" to its designs. Pet. App. 5-6, 37-42. The court found that the ruling in *United States Department of Justice* v. *Julian*, 486 U.S. 1 (1988), did not support petitioner's contention. It explained that *Julian* involved a narrow exception under which the identity of the FOIA requester was taken into consideration to permit persons to obtain otherwise privileged presentence reports that were prepared in connection with criminal charges against them. Pet. App. 38-39. The court noted that, in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Court reaffirmed the narrowness of *Julian*, stating that, "[e]xcept for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request." Pet. App. 39-40 (quoting

Reporters Comm., 489 U.S. at 771). Here, the district court explained, the requesting party (petitioner) is not the person intended to be protected by Exemption 4 and, therefore, its request is not supported by the reasoning of *Julian* and *Reporters Committee*. *Id.* at 42.

After rejecting petitioner's claim of a special right of access, the district court held that the requested information met the general standard for withholding under Exemption 4. There was no dispute that the information is of commercial interest and was obtained from the two named companies. Pet. App. 43-44. The court found that the withheld information met the third requirement, that it be privileged or confidential, because its disclosure would cause substantial harm to the competitive positions of the two companies from whom it was obtained. *Id.* at 44-49 (relying on *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).

4. The court of appeals affirmed. Pet. App. 1-12. The court of appeals rejected petitioner's contention that Exemption 4 of the FOIA should not apply because petitioner allegedly already had access through other sources to the confidential information contained in the withheld documents. *Id.* at 2.[2] It

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[2] Petitioner contended that it has knowledge of any allegedly confidential information contained in the withheld documents because identicality PMAs were granted based on those documents. Pet. App. 6. The two companies that had submitted the documents and obtained the PMAs contended, however, that the design drawings submitted to obtain the PMAs are not necessarily identical to petitioner's original design drawings, on which its type certificate is based, because, under the identicality provision (14 C.F.R. 21.303(c)(4)), the drawings could be substantially different, although portraying

concluded that such knowledge is irrelevant to the FOIA request because "[i]t is a basic principle under FOIA that the individuating circumstances of a requester are not to be considered in deciding whether a particular document should be disclosed." *Id.* at 7-8 (citing *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975)). And in this case, the court noted, petitioner conceded that it cannot prevail if it must proceed under Exemption 4 as if it is any other member of the general public. *Id.* at 8.

The court disagreed with petitioner's contention that *Julian* supports its claim that "confidentiality under Exemption 4 should be examined on a requester-specific basis." Pet. App. 8. It explained that *Julian* involved a narrow exception to the general principle that the identity of the requester is irrelevant to a FOIA request. *Ibid.* In the court's view, because petitioner "is not the party for whom the protections of Exemption 4 were intended, it has no claim of special access." *Id.* at 10 (citing *Reporters Comm.*, 489 U.S. at 771, and *Schiffer* v. *FBI*, 78 F.3d 1405, 1410-1411 (9th Cir. 1996)). The only parties that would have such a claim, the court reasoned, are the two businesses that submitted the information to the FAA. *Ibid.*

The court of appeals also pointed out that its view of Exemption 4 is consistent with the test for determining whether a document is confidential within the meaning of Exemption 4, as set forth in *Morton*,

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the same design. Pet. App. 6. The FAA agreed, however, for purposes of the appeal, to assume that the drawings submitted for the PMAs are identical to the drawings contained in petitioner's type certificate. *Id.* at 7. Similarly, the court of appeals hypothesized that the drawings are functionally indistinguishable. *Ibid.*

supra. Under that test, a court must determine whether disclosure would likely impair the government's ability to obtain necessary information in the future, or would likely cause substantial harm to the competitive position of the person from whom the information was obtained. *Morton*, 498 F.2d at 770. The court below reasoned that it would be impractical to apply that test on a requester-specific basis, which would require a case-specific assessment of the requester and the circumstances surrounding its request. Pet. App. 11. Accordingly, because disclosure of the requested information to the general public would cause substantial harm to the two businesses from which it was obtained, the court of appeals affirmed the FAA's withholding of the information. *Id.* at 12.[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Petitioner concedes (Pet. 15) that, if the proper test is whether disclosure of the requested documents to the general public under the FOIA would cause competitive harm to the submitter, the courts below were correct in determining that the records are exempt under Exemption 4 of the FOIA. Petitioner, however, seeks a special right, shared by no other member of the public, to override the confidentiality interests of the two companies that submitted the requested materials to the FAA. Thus, as the court below recognized, this case presents a

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[3] The court noted that petitioner may be able to obtain the withheld documents through discovery in civil litigation, but emphasized that the FOIA "was not intended to serve as a substitute for discovery." Pet. App. 12 n.4.

narrow and "unusual question" (Pet. App. 2). Indeed, petitioner has not identified any other case arising under Exemption 4 that involved a claim of a special right of access by a competitor of the company that submitted the confidential information to the agency. Further review by this Court therefore is not warranted.

1. Petitioner first contends (Pet. 11-12, 15-26) that the court of appeals' decision conflicts with this Court's decision in *United States Department of Justice* v. *Julian*, 486 U.S. 1 (1988). The court of appeals correctly held, however, that *Julian* does not require disclosure of the withheld documents in this case.

In *Julian*, federal prisoners sought disclosure under the FOIA of presentence reports that had been prepared about them in connection with their sentencings in criminal cases. After sentencing, the reports were transmitted to the Bureau of Prisons for use in determining the requesters' treatment programs and entitlement to various privileges, and were then transmitted to the Parole Commission for use in making federal parole decisions. 486 U.S. at 3, 5-6. The FOIA requesters already had a legal right, in particular circumstances, to see the presentence reports they sought to have released. The presentence reports were required, by statute, to be disclosed to the prisoners about whom the reports were written, prior to their sentencings, subject to withholding of portions that contained information that could harm the prisoner or others (*e.g.*, diagnostic opinions that could disrupt rehabilitation, and sources of confidential information). *Id.* at 3-4. And the prisoners were entitled by law to see the reports at least

30 days before any scheduled parole hearings, subject to withholding of the same portions. *Id.* at 6.

The government declined to disclose the documents in response to the prisoners' FOIA request, however, contending, *inter alia*, that they were protected from disclosure by Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), which authorizes the withholding of agency memoranda "which would not be available by law to a party other than an agency in litigation with the agency," *i.e.*, memoranda that would normally be privileged against civil discovery. *Julian*, 486 U.S. at 11.[4] The Court concluded that Exemption 5 does not apply to withholding of a presentence report from the prisoner about whom it is written because such reports generally are not privileged against pretrial civil discovery by the prisoner, although they are generally privileged in pretrial civil discovery against others. *Id.* at 12-13. The Court ruled that, in light of the absence of any privilege preventing disclosure to a prisoner of his own presentence report in civil discovery, but the existence of such a privilege against disclosure to other persons in civil

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[4] The government also relied in *Julian* on FOIA Exemption 3, 5 U.S.C. 552(b)(3), which permits the withholding of matters "specifically exempted from disclosure by statute" in certain circumstances. The *Julian* Court agreed that all information in a presentence report that is exempt from disclosure by the relevant court rule and statute (*e.g.*, diagnostic reports or sources of confidential information that could harm the prisoner or third parties) is exempt from disclosure under the FOIA. 486 U.S. at 9. The Court pointed out, however, that the relevant court rule and statute required disclosure of the balance of the report to the prisoner and, thus, could not be relied upon to exempt the balance of the report from disclosure to him under Exemption 3. *Id.* at 10-11. Petitioner does not rely on that aspect of the Court's ruling in the instant case.

discovery, there is good reason to differentiate between the prisoner and others in the context of Exemption 5 of the FOIA as well. *Id.* at 14.

The courts below correctly recognized that *Julian* involved a narrow exception to the general principle that the identity of the requester is irrelevant to a FOIA request. The *Julian* exception is limited to cases in which "the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989); *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 496 (1994). Otherwise, "the identity of the requesting party has no bearing on the merits of his or her FOIA request." *Reporters Comm.*, 489 U.S. at 771. The Court has repeatedly emphasized the overarching principle that "Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document].'" *Ibid.* (quoting *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)); accord *Bibles* v. *Oregon Natural Desert Ass'n*, 117 S. Ct. 795, 795-796 (1997) (per curiam).

Petitioner has not identified any case that has created a *Julian*-type exception in the context of documents withheld by an agency under Exemption 4. Petitioner's suggestion that its purported knowledge of the requested information requires selective disclosure notwithstanding Exemption 4 is misguided. See *Schiffer* v. *FBI*, 78 F.3d 1405, 1410-1411 (9th Cir. 1996) (fact that requester knew "much of the information" contained in requested documents did not support claim of special access). If mere knowledge of the contents of a document were sufficient to render

Exemption 4 inapplicable, then numerous other entities could claim special entitlement to disclosure. For instance, access to petitioner's proprietary design information would be available to its customers and contractors and licensees, as well as to the hundreds of "identicality" PMA holders. Moreover, even in *Julian*, the Court did not hold that the FOIA requesters were entitled to disclosure of information that could harm others. 486 U.S. at 9. Thus, the court of appeals here properly declined to extend *Julian* to require disclosure under the FOIA of information that would cause substantial harm to the companies that had submitted it to respondent.

2. Petitioner contends (Pet. 12, 27-29) that the court of appeals' decision conflicts with the decision of another court of appeals in *Grasso* v. *IRS*, 785 F.2d 70, 76-77 (3d Cir. 1986), and the decision of a district court in *Fine* v. *United States Department of Energy*, 823 F. Supp. 888, 909 (D.N.M. 1993).

a. In *Grasso*, the court of appeals held, *inter alia*, that an agency could not withhold from disclosure, under Exemption 7(A) of the FOIA, 5 U.S.C. 552(b)(7)(A), certain portions of an agency memorandum that purported to reflect what the FOIA requester had said to the agency during the course of an interview. 785 F.2d at 72. Exemption 7(A) permits withholding of investigatory records compiled for law enforcement purposes to the extent release "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A). The *Grasso* court merely concluded that release of the interview could not reasonably be expected to interfere with enforcement proceedings. The court observed that such interference generally results from allowing litigants early or greater access to the agency's

investigation file than they would otherwise have, or from revealing to litigants the identities of witnesses that could lead to witness intimidation or a chilling of potential witnesses. 785 F.2d at 76 (citing *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224, 239-240 (1978)). The court found that none of those reasons applied because the FOIA requester had provided his statements to the agency in the first instance. *Id.* at 77.

The *Grasso* court did not create a general FOIA exception based on the requester's identity. It did not involve or discuss Exemption 4 or address the reasons underlying that exemption, and it did not consider the impact of either *Julian* or *Reporters Committee* inasmuch as it predated those decisions. Rather, the *Grasso* court considered the identity of the requester only as it was directly relevant to determining whether Exemption 7(A) applied at all, *i.e.*, whether disclosure would interfere with enforcement proceedings. And the court specifically noted that, even when the document requested is a statement provided by the requester—and, by definition, contains information known to the requester—there could be circumstances when an agency could properly withhold information under Exemption 7(A) from a person who provided the information to it, *e.g.*, where disclosure would reveal the direction of the investigation and therefore make Exemption 7(A) applicable to prevent interference with enforcement proceedings. 785 F.2d at 77. Other cases also have made clear that, while ordinarily there will be no harm to an ongoing investigation when the target of the investigation has possession of, or submitted, the information in question, the agency may make a showing that justifies withholding even under those

circumstances. See, *e.g.*, *Willard* v. *IRS*, 776 F.2d 100, 103 (4th Cir. 1985); *Linsteadt* v. *IRS*, 729 F.2d 998, 1004-1005 (5th Cir. 1984); *Campbell* v. *HHS*, 682 F.2d 256, 262 (D.C. Cir. 1982).

b. In *Fine*, the district court cited *Julian* when it held that an agency could not withhold, under FOIA Exemption 6 or 7(C), 5 U.S.C. 552(b)(6) or (7)(C), certain information from a requester that had been provided by that requester to the agency. Exemption 6 permits withholding of files the disclosure of which would "constitute a clearly unwarranted invasion of personal privacy." Exemption 7(C) permits withholding of investigatory records compiled for law enforcement purposes to the extent that disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Both exemptions require "balancing the privacy interests of the person mentioned in the documents against the public's interest in disclosure." *Fine*, 823 F. Supp. at 907 (citing *Reporters Committee*).

As in *Grasso*, the *Fine* court did not create a general FOIA exception based on the requester's identity, and it did not discuss Exemption 4 or the reasons underlying that exemption. Rather, the *Fine* court considered the identity of the requester only as it was directly relevant to determining whether the exemptions applied at all, *i.e.*, whether disclosure would result in a serious invasion of personal privacy. The court concluded that, on the particular facts of that case, no unwarranted invasion of privacy would result from disclosure of the document because the document contained only allegations and statements by the requester himself, and the requester would not learn the identity of any witness, source or third person not provided by himself. *Fine*, 823 F. Supp. at

908. The court specified, however, that withholding of the name of the agent who had conducted the interview was appropriate.

c. Neither *Grasso* nor *Fine* is inconsistent with the court of appeals' ruling in this case that the FAA is permitted to withhold from petitioner confidential commercial information submitted to the agency by *other* entities. In fact, the court of appeals recognized the principle animating both the *Grasso* and *Fine* courts when it noted that, "[i]f any party has such a claim [*i.e.*, a claim of special access], it would be *only* Promet or TK," the two companies that submitted to the agency the information requested. Pet. App. 10. Finally, as petitioner concedes (Pet. 29 n.13), recent authority from the courts of appeals is consistent with the decision below. See *Maricopa Audubon Soc'y* v. *United States Forest Serv.*, 108 F.3d 1082, 1088 & n.5 (9th Cir. 1997); *Swan* v. *SEC*, 96 F.3d 498, 499-500 (D.C. Cir. 1996); *Schiffer*, 78 F.3d at 1410-1411.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

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October Term, 1996

UNITED TECHNOLOGIES CORPORATION,
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v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent's opposition to the petition brings sharply into focus the anomalous nature of the Second Circuit's ruling in this Freedom of Information Act ("FOIA") case. The documents at issue are design drawings for certain replacement parts for aircraft engines designed and manufactured by petitioner Pratt & Whitney. The design drawings, along with specifications and other design information, were submitted to respondent Federal Aviation Administration ("FAA") by two of petitioner's competitors – Pyromet Industries and Turbine Kinetics – in support of their requests for "identicality" Parts Manufacturer's Approvals ("PMA") for the specified engine parts. It is undisputed that the requested design drawings are *identical*, in fact and as a matter of law, to petitioner's own corresponding design drawings for the covered aircraft engine parts. The FAA and the court of appeals withheld the design drawings as "confidential commercial information" protected from disclosure under FOIA Exemption 4, reasoning that the identicality of the requested drawings to Pratt & Whitney's own drawings "is irrelevant to the FOIA request because '[i]t is a basic principle under FOIA that the individuating circumstances of a requester are not to be considered in deciding whether a particular document should be disclosed.' " Brief for the Respondent in Opposition ("Br. in Opp.") 6, quoting Appendix to Petition for a Writ of Certiorari ("Pet. App.") 7-8. Yet, *in this very case*, both the FAA and the Second Circuit have acknowledged that "the individuating circumstances of a requester" warranted disclosure of certain documents to the requester and to no one else. The FAA not only produced back

to Pyromet and Turbine Kinetics the design information that they had submitted (which included corresponding design information that was on its face proprietary to Pratt & Whitney), it also produced to Pratt & Whitney design specifications, submitted by Pyromet and/or Turbine Kinetics, that were on their face proprietary to Pratt & Whitney. The court of appeals acknowledged that in these circumstances there may be "good reason to differentiate," as this Court put it in *Department of Justice v. Julian*, 486 U.S. 1, 14 (1988), under Exemption 4 between the particular requester and all others. Pet. App. 10 & n.3. Indeed, a contrary decision under Exemption 4 in these circumstances – that is, a decision to withhold from Pyromet and/or Turbine Kinetics information that *they themselves had submitted* to the FAA, or to withhold from Pratt & Whitney information that on its face *belonged to* Pratt & Whitney – would plainly be absurd.

Thus, the rule established by the court of appeals in this case is that Pratt & Whitney is entitled under FOIA to disclosure of any design information submitted (by itself or others) to the FAA that is on its face proprietary to Pratt & Whitney, but it is not entitled to disclosure of design information that is *identical* to (indeed, perhaps even photocopies of) Pratt & Whitney's own proprietary design information because such a disclosure would "override the confidentiality interests of the two companies that submitted the requested materials to the FAA." Br. in Opp. 7. Neither the court of appeals nor the FAA, however, have attempted to explain what "confidentiality interests" the two submitters could conceivably have, vis-à-vis Pratt & Whitney, in design information

that is, in fact and as a matter of law, identical to Pratt & Whitney's own proprietary design information.

This Court's review is therefore warranted to determine whether the court of appeals faithfully followed this Court's teaching in *Julian*. We submit that it did not.[1]

1. Respondent FAA's position in this case is premised entirely on the proposition, adopted by the court of appeals below, that *Julian* "is limited to cases in which 'the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege.' " Br. in Opp. 10 (quoting *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) ("*Reporters Committee*")). But this reading of *Julian* is simply inaccurate, for "the person requesting disclosure" in that case – the prisoner – was plainly not "the party protected by the privilege." The privilege at issue in *Julian* belonged to the

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[1] Respondent FAA is thus in error in observing that we have "not identified any case that has created a *Julian*-type exception in the context of documents withheld by an agency under Exemption 4." Br. in Opp. 10. In *this case* both the FAA and the court of appeals acknowledged the appropriateness of a *Julian*-type exception in the two circumstances described in text. In any event, as discussed in the petition ("Pet." 17-18), there is nothing about the exemptions at issue in *Julian* (Exemptions 3 and 5), or about this Court's reasoning in *Julian*, that would preclude the Court's teaching from being applied in the Exemption 4 context. To the contrary, it seems even more obvious here than in *Julian* that the FOIA does not exempt from disclosure as "confidential" information that is known by the government agency, as a matter both of fact and of law, not to be "confidential" vis-à-vis the requester.

government. Indeed, respondent's own discussion of *Julian* makes this clear:

> The Court concluded that Exemption 5 does not apply to withholding a presentence report from the prisoner about whom it is written because such reports generally are not privileged against pretrial civil discovery *by the prisoner*, although they are generally privileged in pretrial discovery against others. . . . The Court ruled that, in light of the absence of *any privilege preventing disclosure to a prisoner* of his own presentence report in civil discovery, but the existence of such a privilege against disclosure to others in civil discovery, there is good reason to differentiate between the prisoner and other persons in the context of Exemption 5 of the FOIA as well.

Br. in Opp. 9-10 (emphasis added; citations omitted). Thus, respondent well understands that the party protected by the privilege at issue in *Julian*, like all evidentiary privileges incorporated into Exemption 5, was the *government*, not the prisoner requesting disclosure of the presentence report.[2] Respondent itself, therefore, refutes the reading of *Julian* on which it relies and on which the court of appeals' decision is based.

Respondent also argues that "the court of appeals here properly declined to extend *Julian* to require disclosure under the FOIA of information that would cause

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[2] We discuss this point in detail in the petition, demonstrating that the Court's brief description of *Julian* in the *Reporters Committee* case is simply not accurate. Pet. 25-26. Respondent does not specifically respond to this point, although its accurate description of *Julian*, as noted in text, confirms it.

substantial harm to the companies that had submitted it to respondent." Br. in Opp. 11. Again, however, respondent makes no effort to explain how disclosure of the requested design drawings to Pratt & Whitney alone could "cause substantial harm" to Pyromet and Turbine Kinetics in light of the fact that the requested drawings are identical to Pratt & Whitney's own drawings. Certainly disclosure could not harm Pyromet's and Turbine Kinetic's *legitimate* competitive interests.[3]

Finally, the government argues that if knowledge of the contents of requested documents is sufficient to give the requester a special right of access to the information, agencies responding to FOIA requests will have to engage in burdensome inquiries regarding the requester's knowledge, and there may be numerous entities with such knowledge, such as customers, contractors, and licensees of the type certificate holder, as well as "identicality" PMA holders. Br. in Opp. 11. But Pratt & Whitney, as the type certificate holder, enjoys a unique status with respect to the design drawings at issue here, in much the same way that the prisoners in *Julian* enjoyed a unique status with respect to their own presentence reports. Again, in issuing an "identicality" PMA, respondent FAA determines that the submitted design information is *identical* to the type certificate holder's corresponding design information. Accordingly, Pratt & Whitney's design

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[3] To be sure, Pyromet and Turbine Kinetics would be "harmed" in a sense if disclosure of the requested design drawings revealed improper practices on their part. But Exemption 5 was not designed to shield unlawful practices from disclosure or otherwise to protect *illegitimate* competitive interests.

drawings (and only its drawings) are, *by definition*, identical to the design drawings withheld by respondent, and no further inquiry by respondent in the FOIA process is necessary to determine identicality.

2. Respondent wholly fails in its effort to reconcile the decision below with *Grasso v. IRS*, 785 F.2d 70 (3d Cir. 1986), and *Fine v. Department of Energy*, 823 F. Supp. 888 (D.N.M. 1993). Respondent acknowledges that the courts in both cases ordered disclosure to the FOIA requester (and to no one else) of certain information that the requester had provided to the agency, but argues that the courts "considered the identity of the requester only as it was directly relevant to determining whether [the relevant exemption] applied at all." Br. in Opp. 12, 13. In *Grasso*, the question under Exemption 7(A) was whether disclosure would interfere with enforcement proceedings, and in *Fine*, the question under Exemptions 6 and 7(C) was whether disclosure would result in a serious invasion of personal privacy. In both *Grasso* and *Fine*, as respondent acknowledges, the courts concluded that disclosing to the requester information that the requester himself had provided to the government would not (in *Grasso*) interfere with enforcement proceedings, nor (in *Fine*) result in an invasion of personal privacy. Here, by the same token, disclosing to Pratt & Whitney information that is, by definition, not "confidential" as to Pratt & Whitney cannot and will not compromise the confidentiality of the requested identicality information.

Respondent also emphasizes that the *Grasso* court and other courts have noted that in certain circumstances information can be withheld from a requester who already has the information. Br. in Opp. 12-13. It is true

that in certain circumstances the particular purpose of an exemption may be served by withholding information from a requester who already knows the requested information, as when, to use respondent's example, "disclosure would reveal the direction of the investigation and therefore make Exemption 7(A) applicable to prevent interference with enforcement proceedings." *Id.* at 12. Here, however, respondent offers no suggestion as to how Exemption 4's purpose of protecting "*confidential* commercial information" would be served by withholding from Pratt & Whitney information which is by definition identical to its own information and thus not confidential as to it.

Finally, respondent argues that neither *Grasso* nor *Fine* conflicts with the Second Circuit's ruling in this case permitting respondent "to withhold from petitioner confidential commercial information submitted to the agency by *other* entities." Br. in Opp. 14 (emphasis in original). While distinguishing between information submitted by the requester and information submitted by "*other* entities" might make sense in some circumstances, it plainly does not when the information submitted to the agency by other entities is, in fact and as a matter of law, identical to the requester's own information. In any event, this point does not serve to distinguish this case from *Julian*: most of the information contained in the presentence report at issue in *Julian* was provided to the government by persons other than the prisoner requester.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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